86-116

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN AND JOHN S. SLEASMAN,
Petitioners,

VS.

CANINE EYE REGISTRATION FOUNDATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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32 pp

QUESTIONS PRESENTED

1. In an antitrust defendant's counterclaim alleging that the antitrust suit brought against it was within the sham exception to the Noerr-Pennington doctrine, did the evidence adduced by the antitrust plaintiff preclude summary judgment in favor of the antitrust defendant where there was credible evidence that:

(a) The antitrust defendant's own counsel, a distinguished firm of lawyers, had written an opinion to the effect that the antitrust defendant's exclusionary policies might be the basis of antitrust liability;

(b) The Federal Trade Commission had expressed interest in looking at the antitrust defendant's exclusionary policies;

(c) The antitrust plaintiffs, respected veterinarians, all testified that they sought redress in the courts with the expectation they would win and the belief they were right, albeit also with the intention of putting an end to defendant's operation, which the antitrust plaintiffs perceived as a positive evil;

(d) Plaintiff's antitrust claim was disposed of only after considerable discussion and debate on the merits, in both the trial court and the Court of Appeals?

2. If an antitrust case is brought with the intent of putting an end to defendant's operation or business, which business plaintiffs perceive to be a serious threat to their own livelihoods, is such intent to destroy a competing operation alone sufficient to support a finding that the antitrust case is within the sham exception to the Noerr-Pennington doctrine, even though the antitrust plaintiffs reasonably expect to win?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinion below	1
Jurisdictional statement	1
Statement of the case	1
Reasons for granting the writ	4
Argument	5
1. The record contains ample evidence precluding summary judgment in favor of the antitrust defendant on that defendant's counterclaim alleging a sham, frivolous, or baseless suit	5
2. The lower courts have not properly defined sham or frivolous litigation; litigation brought with the reasonable expectation of prevailing is not sham	11
3. This Court should examine the relationship between state law, malicious prosecution law and the sham suit as a Sherman Act violation	12
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

	Page
Beacon Theatres v. Westover, 359 U.S. 500 (1959)	5
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S.Ct. 2161 (1983)	4, 12
California Transport v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609 (1972)	4
Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983)	11, 12
Rickards v. Canine Eye Registration Foundation, Inc., 704 F.2d 1449 (9th Cir.), *cert. denied*, 104 S.Ct. 488 (1983)	3
Standard v. Swint, ____ U.S. ____, 1102 S.Ct. 1781 (1982)	5

Other Authorities

U.S. Constitution:	
First Amendment	4, 12
Fifth Amendment	4
The Noerr Doctrine and its Sham Exception, Handler & De Sevo, 6 Cardozo Law Review, fn. 121	4

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OPINION BELOW

The opinion and judgment of the Ninth Circuit Court of Appeals from which the present petition is brought is reported at 783 F.2d 1329 (Decided February 27, 1986). That opinion and the order denying rehearing are printed in the Appendix hereto. An earlier opinion in this case is reported at 704 F.2d 1449 (9th Cir. 1983), *cert. den.* 104 S.Ct. 488.

JURISDICTIONAL STATEMENT

This petition is filed within 90 days of the Court of Appeals' denial of rehearing, which occurred on April 29, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioners D.A. Rickards, M.A. Custer, Paul V. Belkin and John S. Sleasman are individual veterinarians who are licensed to

practice veterinary medicine in the states of Ohio, California, Missouri and Washington, respectively. Each appellant has established and attempted to pursue a special clinical interest in the field of veterinary ophthalmology.

The Canine Eye Registration Foundation, Inc. ("CERF"), which is the respondent, is a non-profit, tax exempt organization established by the late Dr. Lawrence and Dolly Trauner for the purpose of collecting and disseminating information concerning hereditary eye disease in dogs by establishing a registry of purebred dogs. In order to register a dog, CERF requires that its eyes be examined by a veterinarian certified by the American College of Veterinary Ophthalmologists ("ACVO"). ACVO members evaluate the dogs using forms provided by CERF and charge a fee to the dog's owner. The ACVO veterinarian then returns a copy of the form to CERF with his diagnosis. If the owner remits the original of the CERF form back to CERF with a $5.00 registration fee, CERF will issue a certificate to the owner indicating whether the dog suffers from a hereditary eye defect.

In 1970, the ACVO was founded as an exclusive honor society by a group of professors of veterinary ophthalmology who, for the most part, did not practice clinical veterinary medicine. (RT 4256-59). These founders and certain other privileged early members were "grandfathered" into the ACVO. Subsequently, veterinarians wishing to become certified specialists in veterinary ophthalmology were required to pass a series of tests devised by the original members. Twenty-four of the thirty-three ACVO members practicing in 1975 at the time that CERF was formed had been grandfathered into the college without having been required to take an exam. (RT 2049-51; 2054-56)

None of the petitioners are members of the ACVO. Although both Dr. Rickards and Dr. Belkin applied for membership, neither was accepted. Neither Dr. Custer nor Dr. Sleasman ever applied for ACVO membership. As a result, notwithstanding their demonstrated and recognized ability to conduct hereditary eye examinations on dogs of all breeds (RT 2415-17; PXs 358, 359 and 186), because they were not ACVO members, none of the petitioners could perform canine eye examinations registerable by CERF.

Petitioners brought an antitrust action against CERF and the Trauners. CERF counterclaimed in antitrust, alleging that petitioners' action was sham and frivolous. The District Court granted a directed verdict against petitioners on petitioners' antitrust case. An appeal was taken and the Ninth Circuit affirmed the directed verdict. *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449 (9th Cir.). This Court denied certiorari 104 S.Ct. 488 (1983).

The action was remanded for trial of the counterclaim, the gravamen of which was that petitioners' original action herein was sham and frivolous and therefore within the exception of the Noerr-Pennington doctrine. After a trial of several weeks the issue of whether petitioners' original action was sham was submitted to a six person jury, but a mistrial was declared because certain documents had improperly gone into the jury room. The trial judge, a Magistrate, then invited the parties to file cross-motions for summary judgment, which they did. The Magistrate granted CERF's motion, holding on summary judgment, after the mistrial, that petitioners' original action herein, since dismissed, was sham and frivolous. The Magistrate did this in the face of evidence, summarized in Judge Merrill's subsequent dissent (Appendix, pp. A-13 and A-14), that: (1) CERF's law firm, Kirkland & Ellis, had advised CERF that the CERF-ACVO combination, insofar as it excluded non-ACVO members from performing eye examinations, might be a violation of the antitrust laws; (2) the Federal Trade Commission had expressed interest in looking at CERF's exclusionary policies; (3) all petitioners believed they had a good case against CERF and expected to win; (4) disposition of petitioners' antitrust action required extensive discussion on the merits, both in the District Court and in the Ninth Circuit (704 F.2d 1449). The Magistrate then awarded to CERF the attorney's fees CERF had expended in defending petitioners' antitrust action. This figure was $416,893.99. A judgment for treble this amount (i.e. $1,250,951.51) was then entered against petitioners, together with attorney fees of $35,879.86 and costs. The Ninth Circuit affirmed, Judge Merrill dissenting. Petitioners seek in this Court an order reversing the judgment in favor of CERF and remanding CERF's counterclaim to the trial court for further jury trial.

Petitioners respectfully contend in this Court: (1) That the evidence adduced by petitioners presented a genuine issue of fact, precluding summary judgment, on CERF's claim that petitioners' antitrust case was sham and frivolous; (2) that the Court of Appeals and the District Court applied the wrong substantive rule in judging CERF's allegations that petitioners' antitrust case was sham. Whether a lawsuit is sham or frivolous should depend on whether plaintiff intended to prevail *and* had some reasonable expectation that he might prevail (see Judge Merrill's dissent). It should not depend merely upon a finding that plaintiff intended to put defendant out of business, which is the standard utilized by the Ninth Circuit ("... the uncontradicted record in this case, however, shows that the Rickards group filed their action against CERF not because of a good faith belief that CERF had violated the antitrust laws, but as part of a concerted plan to force CERF out of the veterinary ophthalmology market. This kind of litigation deserves all the chilling effect the law allows." Appendix, p. A-8). Certainly there have been many antitrust cases in which plaintiff, often the government, was motivated by an intent to break up or dismantle what plaintiff perceived to be a monopolistic or anticompetitive organization or program. Practically all antitrust injunction actions partake of that intent. This Court should articulate the substantive definition of a sham or frivolous lawsuit.

REASONS FOR GRANTING THE WRIT

1. The decision in this case is at odds with the important First Amendment policies stated by this Court in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S.Ct. 2161 (1983) and *California Transport v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972). The present decision impinges not only on the right to petition the government for redress of grievances through a lawsuit, but also makes incursions upon the fundamental Fifth Amendment due process right to be heard. *The Noerr Doctrine and its Sham Exception*, Handler & De Sevo, 6 Cardozo Law Review, cases cited at fn. 121.

2. Henceforth in competitor cases any antitrust defendant's lawyer may be remiss if he does not allege by way of counterclaim

that the antitrust suit brought against his client is sham and frivolous. Such an allegation may permit the antitrust defendant to recover its attorney fees, times three. In competitor cases, a responsible plaintiff's lawyer must advise prospective plaintiffs that if they lose they may be liable for a judgment of three times defendant's attorney fees. These considerations will prevent the bringing of many meritorious antitrust cases. To that extent the decision below conflicts with the Congressional policy favoring private enforcement of the antitrust laws and conflicts with decisions of this Court, such as *Beacon Theatres v. Westover*, 359 U.S. 500, 504 (1959) encouraging the private antitrust action.

3. The decision below is erroneous. Manifestly this record presents a genuine issue of fact precluding summary judgment on the question of whether plaintiffs' original suit was a sham. Also, the trial court and the Court of Appeals have not correctly formulated the definition a sham or frivolous lawsuit. If plaintiffs reasonably expect to prevail, their lawsuit is not frivolous.

ARGUMENT

1. The Record Contains Ample Evidence Precluding Summary Judgment in Favor of the Antitrust Defendant on that Defendant's Counterclaim Alleging a Sham, Frivolous, or Baseless Suit

The relevant and fundamental inquiry on the counterclaim is to determine whether the petitioner doctors entertained a "good faith belief that CERF had violated the antitrust laws" and therefore filed their lawsuit with proper motives or whether the doctors filed their suit as part of "a concerted plan to force CERF out of the veterinary ophthalmology market." (Opinion, at p. 10.) This inquiry, however, of necessity requires the finder of fact to probe each doctor's state of mind. It is for this reason that this Court has held in *Standard v. Swint*, ____ U.S. ____, 1102 S.Ct. 1781, 1790 (1982) that "findings as to the design, motive and intent with which men act" are always questions of fact for the jury.

The majority opinion below states that the record is "uncontradicted" that the doctors acted with the anticompetitive intent to eliminate CERF. This is incorrect.

Dr. Rickards testified as follow on cross-examination:

> Q. Because the destruction of CERF is what you wanted to accomplish in this lawsuit; isn't that correct?
>
> A. *No.* (RT 5001).

* * *

> Mr. Hainline: Q. Isn't it a fact that you were thinking lawsuit at least as early as 1977?
>
> A. Yes, but I have to add that what I was talking about here was the ASVO meeting where we had voted to refer this to the legal committee, and I said, *"Let's hope it can be resolved without legal action."* (RT 4951).

* * *

> Q. In connection with the college. So in 1973, you went to your lawyer in connection with the college. In '77, you wrote to Dr. Price, and in 1978, when you wrote KQ in evidence, you had in mind, didn't you, doctor, that if you couldn't get what you wanted, you would bring a lawsuit to accomplish it?
>
> A. I had in mind that *if there was a violation of the law,* something ought to be done about it. (RT 4951-52).

On direct examination, Dr. Rickards testified concerning his motives and his intent in bringing the lawsuit:

> Q. Doctor, finally, let me ask you this: why did you file this lawsuit?
>
> A. Because I believe in justice, because I felt sincerely that I had been wronged and hurt, damaged financially, damaged my reputation, and not just myself but many people across the country who were not in a position to fight back or who were too far away from the mainstream of things to stick

> up for themselves, and I sincerely believed it was something which had to be done, ought to be done, and we did it. (RT 4659).

Dr. Belkin testified that he would not have brought the lawsuit but for the patent discrimination he saw being effected against non-ACVO members (RT 5392-93).

Dr. Sleasman testified that his reasons for joining in the lawsuit involved the good of the profession:

> Q. What was the purpose and what was your state of mind when you agreed to file this lawsuit?
>
> A. After a great deal of deliberation, and the fact that I was aware that CERF was not going to have any designates allowed, I saw my business, what I perceived my business, to be interfered with, I felt that there was an illegal activity [discrimination], in my opinion, that was occurring, and I felt this was bad, not only for myself, but for my breeders, for my owners. I thought it was awful bad for the profession and I did not want to see similar what I would call conspiracies occur and damage what I consider an excellent profession, and *I felt that I should stand up for what I felt and the only way appeared to me that I was going to stand up for what I felt was to join in the lawsuit.* (RT 3617).

In addition, the following lines show very clearly that Dr. Sleasman had no intent to eliminate CERF:

> "Q. *But your view was you would just as soon see them eliminated?"*
>
> "A. *No, I thought the idea of CERF is a fine idea and I—I didn't think that CERF should be eliminated.* I was either willing to be included in CERF or have CERF stop the stuff [illegal discrimination] that they were doing, but *I had no desire to have CERF eliminated."* (19 RT 3519-20).

Finally, Dr. Custer testified about the frustration he experienced in attemping to forfend litigation with CERF and the ACVO:

Q. Prior to filing this lawsuit, doctor, *did you . . . attempt to work out the problems so that the lawsuit wouldn't be necessary?*

A. *I certainly did.*

Q. What did you do?

A. Well, we had the discussions at our national [ASVO] meetings and I was appointed to one of the committees, one of the three committees that have tried to approach CERF and the ACVO.

* * *

And this has been mentioned before at trial, and we went to the Jack Tar Hotel to see if we could get a designate status, knowing that was in the Constitution and Bylaws of CERF, and since we had tried through ACVO, they would not have anything to do with us and so we tried with CERF in 1977 and they passed the buck back to the ACVO. It felt like a pingpoing ball to me, going back and forth. Everyone saying no, it's the other person's responsibility.

And then I attended a meeting in 1976 even preceding that of the ACVO in Las Vegas hoping that we could talk to someone and do something about it.

* * *

Q. And anything else that you did in an attempt to forestall the lawsuit?

A. Oh, many conversations. Many brief meetings trying to figure out what we could possibly do to, could be done to correct the situation.

Q. All right. And tell us, if you would, Dr. Custer, the Court and the jury, *why did you eventually file this suit?*

A. *We had no recourse. We had nothing left.* Admittedly, the CERF had closed up their sending of registration certificates, but they were still doing the eye exams out there in the field for the purpose quote of collecting scientific data, but we full well know that [one] day they can just announce

to all the breeders, "Send in your $5.00 and get your certificate," and they are back in business in twenty-four hours. They didn't really close it up as to this, the effect on those of us who are interested in, truly interested in doing well for the animals.

I just don't think that a small group of veterinanrians, inclusive group, should have that control and they should be out trying to get more veterinarians to examine these dogs and to do as many of those dogs as we can. (RT 3780-82).

In addition, independent evidence shows that the doctors had legitimate reasons to believe that CERF's activities were illegal and in violation of the Sherman Act. As early as March 10, 1978, Kirkland and Ellis, the law firm advising the AVMA, wrote that there was indeed the potential that lawsuit against CERF and the ACVO could succeed:

"Nevertheless, as a preliminary matter *we can envision certain hypothetical combinations of the foregoing facts and circumstances which would render the constitutional provision [discriminating against non-ACVO members] subject to attack as a violation of the antitrust laws.* For example, an antitrust plaintiff, presumably a non-certified veterinarian, could conceivably allege that the constitutional provision constituted a conspiracy by CERF and certain competing veterinarians or veterinarian organizations to cause 'owners of purebred dogs' (CERF Constitution, Article III, Section 1-C) not to deal with plaintiff and other similarly situated non-certified veterinarians. Proof of such an allegation would depend on development of the facts and circumstances discussed in the preceeding paragraph, and possibly on other related matters.

Petitioners obtained a copy of this letter the following month and Dr. Rickards observed:

"It was a revelation to me. I felt convinced that what some of us had believed right along was true, and that there was, in fact, a violation of the laws." (RT 4641: 23-25).

On August 14, 1978, Kirk Gelatt, President of the ACVO wrote to his fellow diplomates of the ACVO and advised them that he had been contacted by an attorney for the FTC who had requested a written report on the CERF-ACVO relationship. (PX 271, Excerpt of Record at p. 108). Dr. Rickards also spoke to the FTC during this period and, based upon those conversations, testified that he was persuaded that CERF's arrangement with the ACVO was a violation of the federal antitrust laws. (RT 4645: 8-14). In fact, the FTC advised the doctors that excluded veterinarians may have a lawsuit against CERF and the ACVO for violation of the Sherman Act. (RT 4641-54).

On October 16, 1978, Kirk Gelatt, wrote to CERF and told Mrs. Trauner that his own attorney had advised him that CERF should open its examinations to all veterinarians and not limit its program to just ACVO members:

> "I have met recently with our attorney, Dr. William Casler of St. Petersburg Beach, relative to the CERF — designate problem. He recommended the following — 'that CERF provide ophthalmic examination forms to all requests and therefore permit CERF examinations by any veterinarian.' " (PX 279, Excerpt of Record at p. 110).

Although Dr. Rickards suspected that there was an antitrust suit as early as March of 1978 when he saw the Kirkland & Ellis opinion letter, he did not file the lawsuit until October, 1979, over a year and a half later. Instead, as Dr. Custer testified at RT 3780-82, he and other doctors attempted to work out a plan that would allow all qualified veterinarians to conduct CERF examinations.

On July 1, 1978 Dr. Rickards wrote that his sole motivation was to keep the practice of ophthalmology open to non-college veterinarians who wished to practice in it and not restrict ophthalmology to the privileged few who were members of the ACVO:

> ". . . I firmly believe that this is a country of laws and not of men. No group has the power, to disqualify and requalify those who were making a living doing something legitimately. In this case, examining eyes for a living." (DX KW, Supp. Excerpt of Record, Vol. II).

Even Mrs. Trauner admitted that petitioners may have been justified in bringing this lawsuit against CERF when she testified:

> "Q. The question is, do you see anything wrong with a citizen going into the courts to try and stop something that is discriminatory?
>
> A. *If that is his belief*... if he believes he is being discriminated against in some fashion illegally, *then certainly I couldn't deny him the right to go to court to seek redress.* (RT 2924: 5-12)

Petitioners' testimony, including their denials of anticompetitive motives, coupled with the extrinsic evidence recounted above when viewed in the light most favorable to petitioners instead of in the light most favorable to CERF, clearly supports an alternative interpretation of petitioners' conduct than the interpretation which has been embraced by the majority below. This evidence requires that the issue of petitioners' good faith be resubmitted to the jury.

2. The Lower Courts Have Not Properly Defined Sham or Frivolous Litigation; Litigation Brought With the Reasonable Expectation of Prevailing Is Not Sham

Upon this issue petitioners cannot do better than to adopt the language of Judge Merrill's dissent:

"The district court made no factual findings on the issue; it simply held that the lawsuit was "baseless and a sham." As backing for the conclusion that it was, the majority opinion cites only the concerted refusal to deal which showed the group's "anticompetitive motivation." But the desire to harm a competitor does not make a lawsuit a sham. Many antitrust suits have the goal of discomfiting competitors.

"Rather, the relevant inquiry is whether the Rickards group intended to prevail and had some reasonable expectation that it might prevail. This is true even if the group intended to "destroy" CERF. "Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition." *Clipper Exxpress v. Rocky Mountain*

Motor Tariff Bureau, Inc., 690 F.2d 1240, 1254 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). The issue is whether the underlying action was commenced "without regard to merit or possible success . . . [and] without any intent to induce favorable action" by the government. *Id.*" (Appendix, p. A-13).

Such a definition protects the First Amendment and due process considerations which are involved in the right to invoke the power of the courts. The First Amendment considerations are summarized in *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 U.S. 2161, at pp. 2169-2170 (1983). That was one of the more recent cases which the majority opinion of the Court of Appeals brushed aside in affirming the present judgment.

3. This Court Should Examine the Relationship Between State Law, Malicious Prosecution Law and the Sham Suit As a Sherman Act Violation

It is important to decide how, if at all, the Noerr-Pennington sham exception is different from state law malicious prosecution actions. Why should a sham lawsuit be an antitrust violation, triable in the federal courts? Why is not the common law remedy entirely adequate to one who believes himself agrieved by a sham antitrust case? Why should there be co-existing definitions of what constitutes a sham lawsuit, a federal definition and a particular state's statutory or judge-made definition? Why should one carry treble damages, the other only single? Is not the state law policy requiring a final determination of the allegedly sham lawsuit before permitting allegations that the suit is sham and frivolous a salutary one from the point of view of the administration of justice? The present case presents an excellent vehicle by which this Court can stem the rising tide of the counterclaim alleging that plaintiff's antitrust action is sham.

CONCLUSION

The Petition should be granted.

July 22, 1986

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United States Court of Appeals
For the Ninth Circuit

No. 84-2185
CV 79-3053 SAW(FSL)

D.A. Rickards; M.A. Custer, Paul V. Belken
and John S. Sleasman,
Plaintiffs-Counterdefendants-Appellants,

v.

Canine Eye Registration Foundation Inc.,
Lawrence M. Trauner, et al.,
Defendants-Counterclaimants-Appellees.

[Filed April 29, 1986]

ORDER

Before: Merrill and Goodwin, Circuit Judges and Williams, District Judge**

Judges Goodwin and William have voted to deny both appellant Sleasman's petition for rehearing and appellants Rickards, Custer and Belkins' petition for rehearing. Judge Merrill has voted to grant the petitions for rehearing.

Appellants' petitions for rehearing are denied.

** Honorable David W. Williams, Senior U.S. District Judge, for the United States District Court for the Central District of California, sitting by designation.

United States Court of Appeals
For the Ninth Circuit

No. 84-2185
CV 79-3053 SAW(FSL)

D.A. Rickards; M.A. Custer, Paul V. Belkin
and John S. Sleasman,
Plaintiffs-Counterdefendants-Appellants,

v.

Canine Eye Registration Foundation, Inc.,
Lawrence M. Trauner and Dolly B. Trauner,
Defendants-Counterclaimants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Owen E. Woodruff, Jr., Chief United States Magistrate and
F. Steele Langford, United States Magistrate, Presiding*
Argued and submitted June 12, 1985—San Francisco

[Filed Feb. 27, 1986]

OPINION

Before: Merrill and Goodwin, Circuit Judges and Williams, District Judge**

Goodwin, Circuit Judge

D.A. Rickards, M.A. Custer, Paul V. Belkin and John S. Sleasman ("Rickards group") appeal from the grant of summary judgment in favor of Canine Eye Registration Foundation, Inc., Lawrence M. Trauner and Dolly B. Trauner, ("CERF") defendants and counterclaimants in this antitrust action. The district court granted summary judgment on the CERF counterclaim,

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* Owen E. Woodruff, Jr., Chief United States Magistrate, presided over the case until he retired.

** Honorable David W. Williams, Senior U.S. District Judge, for the United States District Court for the Central District of California, sitting by designation.

which challenged the Rickards group's original action as a violation of the antitrust laws. We affirm.

I. BACKGROUND

The dispute between these parties is before us for the second time. In *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449 (9th Cir.), *cert. denied*, 104 S. Ct. 488 (1983) ("*Rickards I*"), the district court granted CERF's motion for summary judgment, and entered a directed verdict denying the Rickards group recovery in their antitrust action, and we affirmed. The district court stayed the CERF counterclaim pending the disposition of this first appeal.

The underlying facts of this dispute were discussed in *Rickards I* and need not be discussed at length here. *See id.* at 1451-52. CERF was established as a non-profit organization to collect and disseminate information concerning hereditary eye disease in dogs. It operated a registry listing certain breeds of purebred dogs. Only dogs examined by veterinarians certified by the American College of Veterinary Ophthalmologists ("ACVO") were permitted to conduct the examination required before a dog was listed in the registry. The Rickards group were non-ACVO certified veterinarians, and thus were not permitted to perform the examinations required for CERF registration. This dispute centers on the efforts of the Rickards group either to be allowed to perform such examinations, or to drive CERF from the veterinary ophthalmology market. We turn briefly to the CERF counterclaim.

The counterclaim alleged that the Rickards group had violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2 (1982)), filed a vexatious complaint for an improper purpose, wrongfully interfered with CERF's present and prospective business relationships and had violated the California Cartwright Act and Unfair Trade Practices Act (Cal. Bus. & Prof. Code §§ 16,600, *et seq.*, 16,720 *et seq.*, and 17,000 *et seq.* (West 1964)).

Both the Rickards group and CERF filed cross-motions for summary judgment, and after the motions were fully briefed and argued, the magistrate, sitting as trial judge by stipulation of the parties, granted CERF's motion for summary judgment.

On March 1, 1984, the magistrate signed an order for partial final judgment and held that the Rickards group had (1) violated section 1 of the Sherman Act under both the rule of reason and per se standards; (2) violated Section 2 of the Sherman Act by engaging in a conspiracy to monopolize and an attempt to monopolize trade or commerce; and (3) brought a lawsuit which was baseless and a sham, and in furtherance of their overall scheme to violate the antitrust laws. The court awarded CERF $416,893.99 in damages, and trebled that amount pursuant to 15 U.S.C. § 15 (1982).

After the retirement of the magistrate who originally heard the case, it was assigned to another magistrate. The Rickards group's motion to alter or amend the March 1, 1984 judgment was denied on May 30, 1984 after further briefing and a hearing, and this timely appeal followed.

II. DISCUSSION

We review the grant of summary judgment de novo, and apply the same test as did the district court. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Thus, "[a]ll 'evidence and factual inferences' must be viewed in the light most favorable to the adverse party and the summary judgment may be upheld only if 'there are no genuine issues of material fact and [the movant is] entitled to judgment as a matter of law.' " *Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985) (quoting *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 104 S. Ct. 141 (1983)).

We note that while antitrust conspiracies do not ordinarily lend themselves to summary disposition, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983), summary judgment is sometimes appropriate in antitrust cases. *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 371-72 (9th Cir. 1985); *ALW, Inc. v. United Air Lines, Inc.*, 510 F.2d 52, 55 (9th Cir. 1975). Furthermore, a judgment may be sustained on any ground sup-

ported by the record. *Freuhauf Corp. v. Royal Exchange Assurance of America*, 704 F.2d 1168, 1171 (9th Cir. 1985).

The principal issue on appeal is whether the record supports summary judgment. The Rickards group contends that numerous fact questions required resolution by trial. They have failed, however, to identify, either in their briefs or at oral argument, any disputed material question of fact which was not answered by uncontradicted affidavits or other documentary evidence in the record.

A. Section 1 Violation

To establish a section 1 violation by the Rickard group, CERF had to prove three elements: (1) an agreement or conspiracy, (2) resulting in an unreasonable restraint of trade, and (3) causing "antitrust injury." *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979). The record is replete with correspondence proving an agreement on the part of the Rickards group to drive CERF out of business. While the mere expression of anticompetitive intent is insufficient to establish a section 1 claim, the record establishes acts committed in furtherance of the conspiracy. The Rickard group's vexatious litigation clearly affected CERF's business or property in a negative way; and the injury was of the type cognizable under the antitrust laws.

1. *The Concerted Refusal to Deal.*

The record indicates that after the Rickards group had failed in its efforts to convince CERF to allow veterinarians lacking ACVO-certification to participate in the CERF program, they encouraged ACVO members to stop dealing with CERF. There is evidence that this boycott of CERF met with some success. The minutes of the July 18, 1978 Executive Board meeting of the American Society of Veterinary Ophthalmology ("ASVO"), the professional organization established by the Rickards group, state that "[t]he ACVO members present did indicate that they had cut all ties with CERF." The district court concluded that the Rickards group's concerted refusal to deal with CERF violated

section 1 under both a per se and a rule of reason analysis. We hold that a per se analysis is inappropriate under these facts.

The per se rule governs only if the practice at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 104 S. Ct. 2948, 2960 (1984) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)). Some practices, such as horizontal price-fixing, are clearly subject to a per se analysis. *E.G., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). While there is some older case law suggesting that group boycotts are per se violations of section 1, *see, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959); *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1211 (9th Cir 1983), *cert. denied*, 105 S. Ct. 1874 (1985), the Supreme Court's most recent pronouncement on concerted refusals to deal requires that we look to the type of boycott at issue to determine if per se condemnation is required. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. 2613, 2619 (1985). Unless the challenged activity "falls into a category likely to have predominantly anticompetitive effects," the per se analysis of a concerted refusal to deal claim is overbroad. *Id.* at 2621. Anticompetitive effect is unlikely unless the boycotting part "possesses market power or exclusive access to an element essential to competition." *Id.* Nothing in the record suggests that the Rickards group possessed dominance in the veterinary ophthalmology market, or that it controlled an element essential to competition. On the contrary, it was CERF's growing position in veterinary ophthalmology that triggered the Rickards group's concerted action against it. Therefore, under *Northwest Wholesale Stationers*, the district court's application of a per se analysis to the Rickards group's boycott was premature.

The district court found in the alternative that the Rickards group's concerted action violated section 1 under the rule of reason. Under this analysis, the moving party must establish that the action unreasonably restrained competition. *See Jefferson Parish Hospital District v. Hyde*, 104 S. Ct. 1551, 1567 (1984).

CERF attempted to meet its burden by showing that it temporarily suspended its registration activities during the pendency of the Rickards group's antitrust suit against it. CERF subsequently reentered the market. Nothing in the record indicates that the boycott was the cause of the suspension of its registration business. In fact, the record suggests that the lawsuit was the only cause. Further, CERF may have lost profits from the temporary disruption of its business but failed to assert the claim. Therefore, we cannot affirm the district court's finding that the Rickards group's urging of ACVO members not to deal with CERF of itself violated section 1.

Although we reject the district court's finding of section 1 liability for the concerted refusal to deal orchestrated by the Rickards group, the court nonetheless made a valid finding of section 1 liability. The district court awarded CERF $416,893.99 in damages on its counterclaim.[1] This figure represents the amount spent by CERF in its defense against the antitrust suit filed against it by the Rickards group. Because a single lawsuit, when brought for anticompetitive purposes, may under certain circumstances constitute a violation of section 1, we affirm the district court's finding of liability on that basis. *See e.g., Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984) (single suit may constitute antitrust violation when coupled with anticompetitive conduct external to the suit).

2. *The Noerr-Pennington Doctrine.*

Under the *Noerr-Pennington* doctrine, the petitioning of government is immune from antitrust liability. *See Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Although the doctrine as initially developed protected the petitioning of the legislative and executive branches, it was later extended to immunize from antitrust liability those who seek redress in the courts. *See California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1971). The *Noerr-Pennington* immunity is not, however, absolute. Immunity is not afforded to those who resort to sham or

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[1] The figure was then trebled under 15 U.S.C. § 15 (1982) and attorney's fees for the prosecution of the counterclaim were added.

unfounded litigation solely for anticompetitive purposes. *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984). The Supreme Court has applied the sham exception when a meritless lawsuit is one of a pattern of baseless and repeated claims. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973). This circuit has held that a single meritless suit may also be sufficient to forfend the *Noerr-Pennington* immunity. *Omni Resource*, 739 F.2d at 1414; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1257 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). Our cases require, however, that the sham lawsuit be accompanied by additional evidence of anticompetitive activity before immunity will be called off. We stated in *Omni*:

> When the antitrust plaintiff challenges one suit and not a pattern, a finding of sham requires not only that the suit is baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anti-competitive. . . .
> 739 F.2d at 1414.

In this case we have a baseless lawsuit coupled with the evidence of a concerted refusal to deal which the trial court found sufficient, alone, to support liability. Although there is no evidence that the attempted boycott itself caused any cognizable antitrust injury, it provides sufficient corroboration of the Rickards group's anticompetitive motivation to warrant the application of the sham exception to *Noerr-Pennington*.

The application of the sham exception to single lawsuits may have a chilling effect on those who in good faith seek redress in the courts. The threat of treble damages may discourage the filing of meritorious claims, or preclude plaintiffs from asserting novel or cutting-edge theories of liability. Thus, we must apply the sham exception with caution. The uncontradicted record in this case, however, shows that the Rickards group filed their action against CERF not because of a good faith belief that CERF had violated the antitrust laws, but as part of a concerted plan to force CERF out of the veterinary ophthalmology market. This kind of litigation deserves all the chilling effect the law allows. Further, the filing of suit was not the only overt act committed in

furtherance of the conspiracy. The Rickards group sought to deprive CERF of the services of ACVO-certified veterinary ophthalmologists for its registration program. While the boycott, standing alone, did not support section 1 liability, its evidentiary value in explaining the lawsuit could not be ignored. The trial judge's finding of sham litigation on the paper record before him was the kind of inference drawing protected by Rule 52(a). *Anderson v. City of Bessemer City,* ___ U.S. ___, 105 S. Ct. 1504, 1511-12 (1985).

3. *Antitrust Injury.*

CERF's sole damage claim is that of the costs incurred in defense against the baseless suit filed against it. Despite the application of the sham exception to *Noerr-Pennington,* CERF is not entitled to recover merely because its litigation costs were incurred as a result of the Rickards group's violation of section 1 of the Sherman Act. In order to recover, CERF must prove that the injury was "of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). We have held that the costs incurred in the defense of a suit filed in violation of the antitrust laws constitute antitrust injury as defined in *Brunswick. Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979) ("*Handgards I*"), *cert. denied*, 444 U.S. 1025 (1980). After our decision in *Handgards I*, the Supreme Court construed *Brunswick* to require that the injury alleged in an antitrust suit be "of the type that the antitrust statute was intended to forestall." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983). Because CERF has an adequate state law tort remedy for the Rickards group's abuse of process, we question whether the injury at issue is of the type that Congress sought to redress in enacting the Sherman Act. This Court has specifically held, however, that the principles of antitrust standing set forth in *Associated General Contractors* did not affect our holding in *Handgards I* that the costs of litigating a frivolous suit are cognizable under the antitrust laws. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984) ("*Handgards II*"), *cert. denied*, 105 S. Ct. 963 (1985).

We hold that because the *Noerr-Pennington* immunity does not apply and because CERF claims damages that are treated as antitrust injury in this circuit, summary judgment for counter-claimants on their section 1 claim was proper.

B. Section 2 Violation

To establish a section 2 attempt to monopolize violation, CERF had to prove four elements: "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Rickards I*, 704 F.2d at 1455.

The record contains proof of specific predatory intent and anticompetitive conduct. The evidence shows that the Rickards group intended to keep lay persons from running a registry and that they employed threats of litigation to give effect to this intent. The Rickards group now contends that even if they made the purported threats, these threats do not support section 2 liability because there is no proof that the Rickards had or approached monopoly power. We agree.

The "dangerous probability of success" element may under some circumstances be inferred from direct evidence of specific intent coupled with anticompetitive conduct. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1029 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). When, however, there is no proof of market dominance, the conduct supporting an inference of specific intent to monopolize must be "of a kind clearly threatening to competition or clearly exclusionary." *Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982), *cert. denied*, 105 S. Ct. 2664 (1985). CERF has made no such showing. It has shown only that the Rickards group through its filing of a sham lawsuit inflicted costs upon it that are recoverable under *Handgards I*. It has demonstrated no serious threat to competition in the veterinary ophthalmology market. CERF's own re-entry into that market after the grant of summary judgment in its favor in *Rickards I* cuts against any such finding.

In *Forro Precision*, this court found "implausible" the inference of specific intent to monopolize the worldwide market for electronic data processing products and services from the discreet harm inflicted by IBM against one vendor of IBM-compatible equipment. 673 F.2d at 1061-62. CERF asks us to draw an equally implausible inference. It defines the relevant product market as "veterinary services in general." The claim that the Rickards group, through an attempted boycott of CERF and the filing of a single lawsuit, was attempting to monopolize the nationwide market for all veterinary services is, at best, implausible. Therefore, we hold that the summary judgment in favor of CERF on its section 2 claim was unsupported by the record. Because the damages awarded resulted from the section 1 violation, the magistrate's damage award need not be adjusted despite the lack of section 2 liability.

C. The Damages

Appellants challenge the calculation of damages, asserting that CERF has (1) claimed costs as well as attorney's fees as compensable damages, and (2) failed to allocate and remove from its damage claim the attorney's fees charged in prosecution of the counterclaim.

We may reverse the district court's findings of damages only if it was "clearly erroneous," Fed. R. Cov. P. 52(a), and we must be convinced that a "mistake has been committed." *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1299 (9th Cir. 1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)), *cert. denied*, 104 S. Ct. 279 (1983). No error was committed here.

The cost of defending itself in the first lawsuit through its several appeals is an injury that CERF would not have suffered but for the Rickards group's suit against it. The prevailing party need only provide some basis for a reasonable estimate of damages, *D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982), and CERF has supported its antitrust damage claim for the wrongful infliction of the costs

of this litigation. The district court's damage award was not clearly erroneous.

D. Validity of the Judgment

Finally, appellants assert that the magistrate did not sign the original judgment until March 2, 1984, one day after he had retired, and the judgment is thus void. This contention is not supported by the record. The judgment which appellants challenge is dated March 1, 1984. In addition, CERF explains that appellants' confusion arose due to the fact that the letter with the judgment was misdated because of leap year. We presume that judgments by a court of competent jurisdiction are regular and correct. *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940). The presumption is not rebutted in this case. The judgment is valid.

AFFIRMED.

D. A. Rickards, et al., v.
Canine Eye Registration, et al.,
No. 84-2185

[Filed Feb. 27, 1986]

Merrill, Circuit Judge:

I dissent.

I cannot agree that as a matter of law the suit brought by the Rickards group was sham and that for that reason, as a matter of law, the *Noerr-Pennington* doctrine does not provide immunity from antitrust liability.

The district court made no factual findings on the issue; it simply held that the lawsuit was "baseless and a sham." As backing for the conclusion that it was, the majority opinion cites only the concerted refusal to deal which showed the group's "anticompetitive motivation." But the desire to harm a competitor does not make a lawsuit a sham. Many antitrust suits have the goal of discomfiting competitors.

Rather, the relevant inquiry is whether the Rickards group intended to prevail and had some reasonable expectation that it might prevail. This is true even if the group intended to "destroy" CERF. "Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). The issue is whether the underlying action was commenced "without regard to merit or possible success . . . [and] without any intent to induce favorable action" by the government. *Id.*

Here, the Rickards group knew that CERF's own law firm had warned CERF about possible antitrust problems. The Federal Trade Commission had expressed interest in looking at CERF's exclusionary policies. The group members themselves testified at trial that they had believed CERF's practices to be illegal. A repetitive series of losing lawsuits would present a different case. Here we are faced with a single lawsuit. Further, it was one that the Rickards group saw fit to present to this court on appeal and

after losing here to the Supreme Court on petition for certiorari. The case before this court required a substantial published opinion of 6 pages with 18 headnotes. *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449 (9th Cir.), *cert. denied*, 464 U.S. 994 (1983). This does not look sham to me.

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-116

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN AND JOHN S. SLEASMAN,
Petitioners,

VS.

CANINE EYE REGISTRATION FOUNDATION, INC.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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8 pp

Contents of Supplemental Appendix

	Page
1. District Court order granting summary judgment in favor of CERF on its counterclaim	A-15
2. District Court judgment for treble damages and attorney's fees in favor of CERF on its counterclaim	A-16-18

The United States District Court
For the Northern District of California

No. C-70-3053-SAW(OEW)

D.A. Rickards, M.A. Custer, Paul V. Belkin and
John Sleaman,
Plaintiffs,

v.

Canine Eye Registration Foundation, Inc., (CERF)
Lawrence M. Trauner, Dolly B. Trauner, David E. Lipton,
Alan D. MacMillan, Dennis D. Olin, Randy Scagliotti
and Ralph C. Vierheller,
Defendants.

and Related Actions.

[Filed Feb. 21, 1984]

ORDER

Counterclaimant CERF moved the court for summary judgment against the counterclaim defendants only on its anti-trust claims. Counterclaim defendants opposed this motion and brought on a parallel motion for summary judgment on all of the claims raised by counterclaimants in their counterclaim.

The matters were fully briefed. Oral arguments were heard on February 17, 1984. After careful review, I must conclude that on the record as to which there is no factual dispute the CERF motion for summary judgment on its anti-trust claims must be and is granted. Counterclaim defendants motions are denied.

Counsel for CERF will prepare a form of judgment reflecting the foregoing rulings within 10 days of entry of this order.

IT IS SO ORDERED.

DATED: 2-21-84.

/s/ OWEN E. WOODRUFF, JR.
Owen E. Woodruff, Jr.
Chief United States Magistrate

The United States District Court
For the Northern District of California

No. C-70-3053-SAW(OEW)

D.A. Rickards, M.A. Custer, Paul V. Belkin and
John Sleasman,
Plaintiffs,

v.

Canine Eye Registration Foundation, Inc., (CERF)
Lawrence M. Trauner, Dolly B. Trauner, David E. Lipton,
Alan D. MacMillan, Dennis D. Olin, Randy Scagliotti
and Ralph C. Vierheller,
Defendants.

and Related Actions.

[Filed March 5, 1984]

PARTIAL FINAL JUDGMENT PURSUANT TO RULE 54(b)

In accordance with the provisions of 28 U.S.C. Section 636(c), the parties hereto waived their right to proceed before a Judge of the United States District Court and consented to have a United States Magistrate conduct all proceedings in the case, including trial and order of entry of judgment.

On November 17, 1981, the Court entered a "Partial Final Judgment Pursuant to Rule 54(b) Dismissing with Prejudice All Plaintiffs' Claims Against Defendants Dolly B. Trauner, Lawrence M. Trauner, Canine Eye Registration Foundation, Inc., Ralph C. Vierheller, Alan D. MacMillan, David E. Lipton, Randall H. Scagliotti and Dennis D. Olin." The order and judgment was affirmed by the Ninth Circuit Court of Appeals on May 3, 1983. The United States Supreme Court denied a petition for a writ of certiorari on November 28, 1983.

On February 17, 1984, the Court heard oral argument on cross motions for summary judgment directed to the counterclaims. Counterclaimant Canine Eye Registration Foundation, Inc. ("CERF") moved for summary judgment against the counterclaim defendants on its antitrust claim; counterclaim defendants

opposed this motion and moved for summary judgment to dismiss the claim and the claims of CERF and the Trauners for abuse of process and intentional interference with economic relationships. Having fully considered the briefs and arguments of counsel, on February 21, 1984, the Court granted CERF's motion and denied the motions of counterclaim defendants.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Counterclaim defendants D.A. Rickards, M.A. Custer, Paul V. Bilkin and John S. Sleasman violated Section One of the Sherman Act, 15 U.S.C. Section One, under both the Rule of Reason and *Per Se* standards.

2. Counterclaim defendants Rickards, Custer, Belkin and Sleasman violated Section Two of the Sherman Act, 15 U.S.C. Section Two, by engaging in a Conspiracy to Monopolize and an Attempt to Monopolize trade or commerce.

3. The lawsuit brought by Rickards, Custer, Belkin and Sleasman was baseless and a sham; it was also brought to further and as part of an overall scheme to violate the antitrust laws.

4. By reason of counterclaim defendants' violations of the antitrust laws, CERF sustained damage in the amount of $416,893.99, and in accordance with 15 U.S.C. Section 15, shall recover three times this amount and its reasonable attorney's fees.

5. CERF shall have and recover, jointly and severally, from counterclaim defendants Rickards, Custer, Belkin and Sleasman the sum of $1,250,681.90, and its reasonable attorney's fees for the prosecution of its counterclaim in the amount of $35,879.86. Statutory interest on the total judgment shall accrue at the rate of 10% from this date.

6. Pursuant to F.R.Civ.Pro., Rule 54(b), this Court expressly determines that there is no just reason for delay in entering a final, appealable judgment on CERF's counterclaim, and hereby directs the Clerk of the Court to enter forthwith this Partial Final Judgment.

7. Trial on counterclaimants' claims for abuse of process and intentional interference shall proceed as later ordered by this Court.

Dated: March 1, 1984.

/s/ OWEN E. WOODRUFF, JR.
Owen E. Woodruff, Jr.
Chief United States Magistrate

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-116

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN,
Petitioners,

v.

CANINE EYE REGISTRATION FOUNDATION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In opposing respondent's motion for summary judgment, did petitioners create genuine issues of material fact with unsubstantiated hearsay and assertions which, upon cross examination, petitioners admitted were false?

2. Does the Noerr-Pennington doctrine immunize a sham and baseless lawsuit brought as a coercive device, a "two-by-four," which was filed to further a pre-existing, horizontal agreement to eliminate competition with no countervailing procompetitive justification?

ADDITIONAL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT

In addition to the parties listed in the caption, the following parties were named as defendants in the district court, and were dismissed in decisions either not appealed or on which the appeal was abandoned:

American Veterinary Medical Association
American College of Veterinary Ophthalmology
Paul F. Dice
Kirk N. Gelatt
Seth A. Koch
Charles L. Martin
Charles J. Parshall
Lionel F. Rubin

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
ADDITIONAL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
I. PROCEEDINGS BELOW	2
II. THE FACTS	6
A. The Procompetitive CERF Program	6
B. Petitioners' Efforts to Destroy the Increased Competition Offered by CERF	8
REASONS FOR DENYING THE WRIT	10
I. THE COURTS BELOW CORRECTLY FOLLOWED THIS COURT'S GUIDELINES FOR DECIDING	10
A. The Petition Seeks A Second Appellate Review of Facts and Evidence, Not Of Any Legal Principles	11
B. Petitioners' So-Called Evidence Was Inadmissible and/or Implausible	12
1. The Kirkland & Ellis Letter	12
2. The Unsubstantiated Federal Trade Commission Hearsay	13
3 . The Kirk Gelatt Double Hearsay	14
4. Petitioners' "Pure-Heart" Protestations	14

TABLE OF CONTENTS—Continued

Page

II. THE DECISIONS BELOW THAT PETITIONERS' LAWSUIT WAS UNPROTECTED BY NOERR-PENNINGTON WERE CORRECT AND IN HARMONY WITH THIS COURT'S DECISION 15

A. Petitioners' Suit Was Filed to Achieve an Unlawful Collateral Purpose 16

B. Petitioners' Lawsuit Was Baseless and a Sham 17

C. Petitioners' Peculiar Preemption Argument.. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Liberty Lobby, Inc., —— U.S. ——, 106 S.Ct. 2505, (1986)	10
Aydin Corp. v. Loral Corp., 718 F.2d 897 (9th Cir. 1983)	17
Baker v. Schofield, 243 U.S. 114 (1917)	11
Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984)	15
Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir. 1983)	15
Celotex Corp. v. Catrett, —— U.S. ——, 106 S.Ct. 2548 (1986)	10
Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1257 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983)	16
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962)	17
Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830 (9th Cir. 1980)	17
Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U.S. 275 (1944)	11
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	11
Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983)	17
Matsushita Electric Industrial Co. v. Zenith Radio Corp., —— U.S. ——, 106 S.Ct. 1348 (1986)	10
Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983)	15
Montana v. United States, 440 U.S. 147 (1979)	6
NAACP v. Button, 371 U.S. 415 (1963)	17
Omni Resource Development Corp. v. Conoco, Inc., 739 F.2d 1412 (9th Cir. 1984)	16
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	16
Perma Research & Development Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969)	15

TABLE OF AUTHORITIES—Continued

Page

Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Cir. 1975) 15
Rickards v. Canine Eye Registration Fdtn. Inc., 704 F.2d 1449, *cert. denied*, 464 U.S. 994 (1983) ..... *passim*
Rickards v. Canine Eye Registration Fdtn., 783 F.2d 1329 (1986) ..... *passim*
Scott & Fetzer Co. v. Dile, 643 F.2d 670 (9th Cir. 1981) 3
U.S. Audio & Copy Corp. v. Philips Business Systems, Inc., 1983-1 Trade Cases (CCH) ¶ 65,364 (N.D. Cal. 1983) 17-18
United States v. Johnson, 268 U.S. 220 (1925) 11
Van T. Junkins and Associates v. U.S. Industries, 736 F.2d 656 (11th Cir. 1984) 15
Williams Mfg. Co. v. United States Shoe Machinery Corp., 316 U.S. 364 (1942) 11

Other Authories

Note, 86 Harv. L. Rev. 715, 732-35 (1973) 17
Restatement (Second) of Judgments § 27 (1982) .. 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-116

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court had earlier made Findings of Fact and Conclusions of Law, many of which are relevant here, and which are printed at App. B. These were affirmed by the Ninth Circuit in *Rickards v. Canine Eye Registration Fdtn., Inc.*, 704 F.2d 1449, *cert. denied*, 464 U.S. 994 (1983), printed at App. C. (*"Rickards I."*). The district court's judgment leading to this peti-

tion is printed at App. D. The Ninth Circuit's affirmance, *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329 (1986) ("Rickards II") is printed at App. E; the Order denying the petition for rehearing is printed at App. F.

STATUTES INVOLVED

The case involves Section 1 of the Sherman Act, 15 U.S.C. 1, printed at App. A.

COUNTERSTATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Petitioners ignore the proceedings leading to *Rickards II*, which highlight the sham and baseless nature of petitioners' claims.

On October 31, 1979, petitioners filed an action asserting claims under Sections 1 and 2 of the Sherman Act against AVMA, ACVO, CERF, the Trauners, and certain individual members of ACVO (CR 1).[1]

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[1] The following abbreviations will be used throughout:

"The Trauners" are Lawrence M. Trauner (deceased) and Dolly B. Trauner;

"CERF" is respondent Canine Eye Registration Foundation, Inc.;

"ACVO" is the American College of Veterinary Ophthalmology;
"AVMA" is the American Veterinary Medical Association;

"Pet." and "Petition" refer to the Petition for a Writ of Certiorari;

The Clerk's Record on Appeal is designed "CR", followed by the number indexed on the Clerk's docket sheet and page numbers in the document as filed in the district court;

"RT" is the Reporter's Transcript of the trial, followed by appropriate page and line numbers;

"PX" refers to plaintiffs' (now petitioners) exhibits at trial, while "DX" refers to defendants' (respondents here) trial exhibits.

All emphasis in quotations has been added unless otherwise noted.

CERF and the Trauners filed counterclaims, alleging violations of Section 1 and 2 of the Sherman Act, abuse of process, interference with present and prospective business relationships and violations of California's antitrust law, the Cartwright Act (CR 30:9-10).

AVMA, ACVO, and all non-California ACVO defendants moved to dismiss the claims against them for lack of personal jurisdiction and improper venue (CR 12, 76, 126). The motions were granted and the district court entered final judgments under Fed.R.Civ.P., Rule 54(b) on behalf of AVMA, ACVO and the moving ACVO defendants (CR 45, 105, 156). Petitioners filed a Notice of Appeal (CR 182) which was later abandoned (CR 323) and did not appeal from the dismissal of AVMA (CR 404).

The remaining defendants moved for an order *in limine* to exclude expert testimony of persons not previously designated by name in the joint pretrial statement and to preclude introduction of undesignated documents into evidence (CR 341). The district court ordered that petitioners could not offer expert witness testimony at trial by any person they had not designated in the Joint Pretrial Statement and, in accordance with *Scott & Fetzer Co. v. Dile*, 643 F.2d 670, 673-75 (9th Cir. 1981), ordered that each side was limited to offering at trial documents from their own or their opponents' exhibit lists (CR 402).

Defendants had concurrently moved for summary judgment to dismiss petitioners' antitrust damage claims (CR 341) on the ground that, if the *in limine* motions were granted, there was no competent evidence of damages that could be offered at trial. Each petitioner had admitted at deposition that without a detailed reference to his undesignated and excluded business documents, any estimate he might make as to the amount of damages claimed would be pure speculation. The district court

granted the motion for summary judgment dismissing petitioners' antitrust damage claims (CR 402).

Trial on petitioners' antitrust injunctive claims was to the District Court with an advisory jury (CR 588 at 63:21-24) and to the jury on the common law claims. Trial proceeded for 36 days, producing 5,832 pages of reporter's transcript and some 600 trial exhibits. At the close of petitioners' case, defendants moved under Fed.R.Civ.P., Rule 41(b) for dismissal of the antitrust injunctive claims, and under Fed.R.Civ.P., Rule 50(a) for a directed verdict on the common law claims (CR 470). The motions were fully briefed (CR 471, 472, 477, 480-83), argued (30 RT 5468:20-5471:7) and granted (30 RT 5471:8-5475:21). Petitioners made a motion for reconsideration, which was also fully briefed (CR 534, 537, 540, 543) and denied (CR 554).

The baselessness of petitioners' claims caused the District Court to observe:

> Now, this is not the fabric from which antitrust litigation emerges. This is, in this Court's opinion, illustrative of the fact that anybody who has $65 for a filing fee can come into court and litigate.

(30 RT 5475, 8-15).

After dismissal of petitioners' claims, CERF and the Trauners proceeded to put on that portion of their counterclaim not proven by petitioners' own evidence. The counterclaim went to the jury October 1, 1980. On October 5, 1981, a mistrial was declared because a Court official had placed in the jury room the Court's copy of Volume 31 of the transcript; this contained argument between counsel outside the jury's presence about whether the jury should be told that the Court had ruled against petitioners on their claims (34 RT 5823:22-5824:2). The jury read, considered, discussed and was prejudiced by the material.

After trial and mistrial, the district court entered a Partial Final Judgment pursuant to Fed. R. Civ. P., Rule 54(b), dismissing with prejudice petitioners' claims against the Trauners, CERF, and the remaining ACVO defendants. (CR 553). Petitioners appealed to the Ninth Circuit, which affirmed "[a]fter viewing the record in its entirety" *Rickards I*, 704 F.2d 1449, 1452. A petition for rehearing was denied.

Petitioners then sought review on a petition for a writ of certiorari, which was denied November 28, 1983, 464 U.S. 994. Shortly thereafter, on December 12, 1983, the district court requested the parties to file cross-motions for summary judgment on CERF's counterclaim and designated February 17, 1983 as the date for oral argument (CR 635). The motions were fully briefed, with 132 pages of memoranda addressing every issue the parties considered to be important. Absent from petitioners' papers was any evidence genuinely disputing the facts upon which CERF relied in support of its motion (CR 636, 641, 645).

The district court granted CERF's motion for summary judgment (CR 647), and signed a Partial Final Summary Judgment which the Clerk entered on March 5, 1985 (App. C).

After the retirement of Chief Magistrate Owen E. Woodruff, Jr.,[2] the case was reassigned to Magistrate F. Steele Langford for further proceedings (CR 655). Petitioners brought a motion to alter or amend the judgment for hearing before Magistrate Langford (CR 656). After oral argument and consideration of extensive briefing (CR 657, 659), the district court denied the motion (CR 665).

Petitioners appealed to the Ninth Circuit, which affirmed the district court's finding of liability and dam-

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[2] Magistrate Woodruff has been sitting as trial judge by stipulation since June 24, 1980 (CR 87).

ages under Section 1 of the Sherman Act, *Rickards II*, 783 F.2d 1329 (1986) and denied a petition for rehearing on April 29, 1986 (App. F).

II. THE FACTS

As in their earlier petition, petitioners assert a fanciful distortion of the facts, which repeatedly contradicts issues litigated and determined in *Rickards I*. Where the Rickards veterinarians do not contradict facts they are estopped to challenge, *Restatement (Second) of Judgments* § 27 (1982); *Montana v. United States*, 440 U.S. 147, 153 (1979), they pretend to facts unsupported by their citations to the record and which ignore their own sworn testimony and documents.

The facts on which the district court and Ninth Circuit—after twice reviewing the entire record, *Rickards I*, 704 F.2d at 1452; *Rickards II*, 783 F.2d at 1132—decided and affirmed the summary judgment at issue, are not fairly in dispute. These facts (1) are established by collateral estoppel, (2) are admitted by the Rickards veterinarians' own testimony and documents, or (3) were never contested when CERF made its motion for summary judgment. The record as a whole established:

A. The Procompetitive CERF Program

CERF "is a non-profit, tax-exempt charitable organization. None of CERF's officers or directors is a veterinarian. According to its constitution, CERF's purpose is to collect, collate, and disseminate information concerning hereditary eye diseases in dogs by establishing a registry listing purebred dogs of those breeds that are susceptible to hereditary eye diseases. CERF requires dogs to be examined by veterinarians certified by the American College of Veterinary Ophthalmologists ('ACVO') before listing the dogs in its registry. ACVO members evaluate the dogs using forms provided by CERF. The ACVO veterinarians then return one copy of the form

to CERF, and, if the owner remits the original to CERF with a $5.00 registration fee, CERF issues to the owner a certificate indicating whether the dogs suffer from hereditary eye defects. Regardless of whether the owner sends the original and the fee to CERF, the information from the examining veterinarian is tabulated and made available to dog breeders and researchers around the country." (*Rickards I*, 704 F.2d at 1451-52 (c-2-3); App. B, FF I.2, I.6, I.7, I.8, I.9.)

"Veterinarians wishing to become ACVO certified specialists in veterinary ophthalmology must pass a series of tests devised by ACVO under general guidelines established by the American Veterinary Medical Association. The applicant first presents his or her credentials to ACVO. If the applicant's qualifications meet ACVO's Credential Committee's standards, the applicant must then take and pass written, oral and practical qualifying exams before receiving ACVO certification. Approximately 84% of the applicants are ultimately certified." (*Rickards I*, 704 F.2d at 1452 (c-3); App. B, FF I.4, I.5.) "The ACVO examination has been fair and impartial." (App. B, FF I.5).

"AVMA has recognized no veterinarians except members of ACVO as possessing special training, skill and competency in veterinary ophthalmology" (App. B, FF I.4; *Rickards I*, 704 F.2d at 1452 n.2 (c-3)). "No veterinarians except members of ACVO have ever been identified by name to the lay public by the AVMA, or any other veterinary organization, as being competent in veterinary ophthalmology" (App. B, FF I.18).

Far from having a "demonstrated and recognized ability to conduct hereditary eye examinations" (Pet. 2), petitioners "are veterinarians who could not or did not pass ACVO's certification exams . . ." (*Rickards I*, 704 F.2d at 1452 n.2 (c-3-4)). Rickards "sat for ACVO's written exam seven times and failed each time." Belkin's "credentials were rejected by ACVO's Credentials Committee in 1975. He has not resubmitted his credentials

although invited to do so. . . . Neither Dr. Custor nor Dr. Sleasman has ever applied for ACVO membership" (*Rickards I*, 704 F.2d at 1452 n.3 (c-3-4); App. B, FF I.19.) "ACVO members are the only veterinarians who have objectively demonstrated that they are qualified to perform [CERF's] hereditary eye examinations" (*Rickards I*, 704 F.2d at 1454). No petitioner has objectively demonstrated that he has any "special training, skill or competence in veterinary ophthalmology" (App B, FF I.20).

"CERF offered a new service and product. Prior to CERF's incorporation, there had never been an all breed eye registry which accumulated reliable examination data and offered verification to dog owners and breeders that an examination had been performed by a reliable examiner" (App. B, FF I.14). The new service and product which CERF offered increased competition in the veterinary ophthalmology market (*Rickards I*, 704 F.2d 1455 (c-10)).

B. Petitioners' Efforts to Destroy the Increased Competition Offered by CERF

Petitioners took no steps to form a rival registry as an alternative to CERF because, they admitted, they "had no background, experience or desire to do so" (CR 657, p. 24; CR 638, p. 8). Instead, petitioners agreed among themselves and with other horizontal competitors, primarily veterinarians with an interest in ophthalmology who had not been board certified, to force CERF out of the veterinary ophthalmology market and eliminate its objective standards of quality control.

Petitioners proposed that the American Society of Veterinary Ophthalmology ("ASVO"), "the professional organization established by [petitioners]", *Rickards II*, 783 F.2d at 1332, "tak[e] over CERF's functions should the opportunity arise" (DX IY). Petitioners reached agreement with other veterinarians to force CERF to eliminate its quality control standards and to demand that "The present owners of CERF will make specific

arrangements to phase out their control of the organization during the next 2 years. They will hand over all of the records, files, correspondence, etc. to a joint committee of ACVO-ASVO members on or before January 1, 1980, who will carry on with the work of the organization in their place." (DX KQ; 26 RT 4945:2-4946:20; 27 RT 4965:13-24). Petitioners then demanded agreement among all ACVO members to "Close CERF permanently and take eye registration out of the control of lay people" (DX QJ).

At first, petitioners hoped to force CERF out of the veterinary ophthalmology market by pressuring ACVO members to agree not to do business with CERF. (26 RT 4949:12-4950:21). As a result of petitioners' efforts, certain "ACVO members—did indicate that they had cut all ties with CERF" (*Rickards II*, 783 F.2d at 1332 (c-5); DX LP, p. 3).

However, petitioners realized that not all ACVO members would join or acquiesce in the agreement to destroy CERF. Rickards wrote, "We cannot expect any of the ACVO to modify or drastically change their position *without a little coercion from the outside*" (DX KW, p. 2). The "coercion" needed to complete the overall anticompetitive scheme of the conspiracy was a lawsuit, which Rickards characterized as a "two-by-four to get the attention of . . . mule-like creature[s]" who would otherwise not join his group (CR 317, pp. 1:2-2:14).

Petitioners lawsuit was brought to force CERF out of the veterinary ophthalmology market when the conspiracy alone could not do so. Rickards admitted:

> Q. . . . The abolishment of CERF was one of the things you wanted to and planned to accomplish through Alioto & Alioto; isn't that correct?
>
> A. Yes, I would say so.

(27 RT 5009:14-23).[3]

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[3] Petitioners quote from Rickards earlier denial (Pet. 6). Such "conflicting statements do not create a factual dispute sufficient to

REASONS FOR DENYING THE WRIT

I. THE COURTS BELOW CORRECTLY FOLLOWED THIS COURT'S GUIDELINES FOR DECIDING

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of every action." *Celotex Corp. v. Catrett*, —— U.S. ——, 106 S.Ct. 2548, 2555 (1986). "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see if there is a genuine need for trial." Advisory Committee Notes to 1963 Amendment, Fed. R. Civ. P., Rule 56(e). In assessing proof in order to determine whether there is a *genuine* issue for trial, the court must determine whether the factual context renders a claim or defense implausible. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, —— U.S. ——, 106 S.Ct. 1348, 1356 (1986). The court must look at "the record taken as a whole," *Matsushita*, 106 S.Ct. at 1356, just as it would in deciding a motion for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S.Ct. 2505, 2512 (1986); *Celotex*, 106 S.Ct. at 2553.

The courts below were faithful to these standards. The Ninth Circuit held:

> We review the grant of summary judgment de novo, and apply the same test as did the district court. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Thus, "[a]ll 'evidence and factual inferences' must be viewed in the light most favorable to the adverse party and the summary judgment may be

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avoid summary judgment. They raise sham issues." *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 344 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983); See p. 15 below.

> upheld only if 'there are no genuine issues of material fact and [the movant is] entitled to judgment as a matter of law.' " *Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985) (quoting *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 104 S.Ct. 141 (1983)).

Rickards II, 783 F.2d at 1332 (e-4).

The court determined that, on the record as a whole, petitioners' assertions of supposed factual disputes were overcome by uncontradicted affidavits and other documentary evidence *Rickards II*, 783 F.2d at 1332-34 (e-4-5).

A. The Petition Seeks a Second Appellate Review of Facts and Evidence, Not of Any Legal Principle

Before affirming the district court's summary judgment for CERF, the Ninth Circuit for the second time reviewed de novo a massive record. *Rickards I*, 704 F.2d at 1452 (c-4); *Rickards II*, 783 F.2d at 1332 (e-4). Petitioners' challenge to the summary judgment requests the Court to conduct a second—actually a third—appellate review of the entire record, with 5,832 pages of reporter's transcript and some 600 trial exhibits. Such a review would waste the Court's valuable writ of certiorari power.

"A court of law, such as this court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *accord Williams Mfg. Co. v. United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker v. Schofield*, 243 U.S. 114, 118 (1917). Additionally, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

B. Petitioners' So-Called Evidence Was Inadmissible and/or Implausible

The bits and pieces of "evidence" which petitioners claim created genuine issues of material fact are a jumble of hearsay, speculation and statements which petitioners themselves later admitted to be false. None was sufficient to create a genuine factual issue.

1. *The Kirkland & Ellis Letter*

Petitioners assert: "CERF's law firm, Kirkland & Ellis, had advised CERF that the CERF-ACVO combination, insofar as it excluded non-ACVO members from performing eye examinations, might be a violation of the antitrust laws." (Pet. 3). Every assertion respecting the letter is false.

—Kirkland & Ellis represented AVMA, not CERF (25 RT 4634:10-12; PX 253).

—The firm was advising AVMA, not CERF and not petitioners (25 RT 4634:10-15).

—The document is a "series of hypotheticals" reflecting "imperfect factual background provided to Kirkland & Ellis" (25 RT 4635:10-14, by the court).

—The document concludes that an antitrust "allegation" "might, conceivably, be troublesome" only if a series of facts existed, namely:

> (i) CERF's activities were controlled formally or informally by certain veterinarians or veterinarian organizations; (ii) few, if any, non-certified veterinarians were "designated" by ACVO (iii) the requirement of Board certification was not reasonably related to the objective of the constitution provision; (iv) the constitutional provision had an adverse impact on the practice of non-certified competing veterinarians; (v) there existed alternative methods of accomplishing the provision's objective which would have a less adverse impact on the practice of non-certified competing veterinarians.

Petitioners never had *any* evidence to support any of these hypotheticals (*Rickards I*, App. B; App. C, FF).

—Petitioner Rickards (whose testimony the Petition cites) admitted that Kirkland & Ellis possessed no facts, but was merely speculating:

> Q. So you understood that as of this point in the letter, they were saying that we don't have the facts; and whether it would be a violation or not would be dependent on the facts and circumstances?
> A. Right.

25 RT 4715:18-22.

2. *The Unsubstantiated Federal Trade Commission Hearsay*

Petitioners assert: "the Federal Trade Commission had expressed an interest in looking at CERF's exclusionary policies" (Pet. 3) and "the FTC advised the doctors that excluded veterinarians may have a lawsuit against CERF and the ACVO for violation of the Sherman Act" (Pet. 10, citing testimony of petitioner Rickards).

This unsubstantiated hearsay was exploded on Rickards' cross-examination:

> Q. You described an investigation by the FTC that occurred pursuant to your complaint; do you remember that?
> A. Yes.
> Q. Did the FTC ever take any action with regard to this matter?
> A. I am not sure I understand the meaning of the word, "Action," but if you mean calling people up asking questions, yes. Going into Court, No.
> Q. So they called people up, and they obtained information, and after obtaining information, they did not take any action; correct?
> A. That's correct.

25 RT 4721:6-17.

3. *The Kirk Gelatt Double Hearsay*

Petitioners would find a material disputed fact in a double hearsay letter where a Dr. Gelatt relays his attorney's "advice." (Pet. 10), The attorney advised—based upon unknown information—"That CREF . . . permit CREF examination by any veterinarian" (PX 279—the misspelling is in the exhibit).

This ambiguous double hearsay created no material dispute. CERF could not have permitted "any veterinarian" to perform its examinations:

> CERF provided examination forms only to ACVO members and would accept no other type of form for inclusion in its registry. The reason justifying this CERF-ACVO relationship is valid. ACVO members are the only veterinarians who have objectively demonstrated that they are qualified to perform the hereditary eye examinations. Obviously, examination reliability is of utmost concern to CERF.

Rickards I, 704 F.2d at 1454 (c-7).

Moreover, Gelatt's letter followed closely upon the agreement between some ACVO members and petitioners to "cut all ties with CERF and [ask] CERF to remove the requirement . . ." (DX LP, p.2; see *Rickards II*, 783 F.2d at 1332 (e-5)).

4. *Petitioners' "Pure-Heart" Protestations*

Both the district court and the Ninth Circuit properly found that petitioners' protests of piety (Pet. 6-11) created no material disputes as to their motives and intentions. Petitioners' documents and testimony on cross-examination admitted that their lawsuit was the "little coercion from the outside" needed to pressure ACVO into agreeing to "Close CERF permanently and take eye registration out of the control of lay people" (DX KW, QJ, KQ), and to "de-CERF the profession once and for all" (DX NF; 29 RT 5338:6-5339:4; 5342:24-5343:14; 5344:6-5350:12). The lawsuit was brought to complete

"the abolishment of CERF" (27 RT 5009:14-18; 19 RT 3520:20-3521:25; 27 RT 5019:18-22); the lawsuit was a "two-by-four to get the attention of . . . mule-like creatures" who had refused to join or acquiesce in the agreement (CR 317, 1:2-2:14).

Petitioners' assertions, contradicting both their sworn cross examined testimony and their own documents "do not create a factual dispute sufficient to avoid summary judgment. They raise sham issues." *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 344 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983); *Radobenko v. Automated Equipment Corp.* 520 F.2d 540, 544 (9th Cir. 1975); *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1366 (8th Cir. 1983); *Van T. Junkins and Associates v. U.S. Industries*, 736 F.2d 656, 658-59 (11th Cir. 1984); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

II. THE DECISIONS BELOW THAT PETITIONER'S LAWSUIT WAS UNPROTECTED BY NOERR-PENNINGTON WERE CORRECT AND IN HARMONY WITH THIS COURT'S DECISION

Both courts below found petitioners' lawsuit unprotected by *Noerr-Pennington* immunity because, as shown by undisputed facts established by the entire record (1) the suit was brought to further an independent, preexisting conspiracy to destroy competition, and (2) the lawsuit was sham and baseless. App. D, p.2; *Rickards II*, 783 F.2d at 1334. The Ninth Circuit properly followed this Court's decisions and applied the correct legal standard to these undisputed facts, holding:

"Under the *Noerr-Pennington* doctrine, the petitioning of government is immune from antitrust liability. *See Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct.

1585. 14 L.Ed.2d 626 (1965). Although the doctrine as initially developed protected the petitioning of the legislative and executive branches, it was later extended to immunize from antitrust liability those who seek redress in the courts. *See California Transport v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609 611-12, 30 L.Ed.2d 642 (1971). The *Noerr-Pennington* immunity is not, however, absolute. Immunity is not afforded to those who resort to sham or unfounded litigation solely for anticompetitive purposes. *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984). The Supreme Court has applied the sham exception when a meritless lawsuit is one of a pattern of baseless and repeated claims. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380, 93 S.Ct. 1022, 1031, 35 L.Ed.2d 359 (1973). This circuit has held that a single meritless suit may also be sufficient to forfend the *Noerr-Pennington* immunity. *Omni Resource*, 739 F.2d at 1414; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1257 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 768 (1983). Our cases require, however, that the sham lawsuit be accompanied by additional evidence of anticompetitive activity before immunity will be called off. We stated in *Omni*:

> When the antitrust plaintiff challenges one suit and not a pattern, a finding of sham requires not only that the suit is baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anti-competitive . . . . 739 F.2d at 1414."

Rickards II, 783 F.2d at 1333-34 (e-8-9).

A. Petitioners' Suit Was Filed to Achieve an Unlawful Collateral Purpose

This Court has consistently held that "First Amendment rights may not be used, as the means or the pretext for achieving 'substantive evils' . . . which the legislature

has the power to control." *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *NAACP v. Button*, 371 U.S. 415, 444 (1963). A lawsuit brought to achieve a pre-existing independent scheme to destroy competition does not enjoy *Noerr-Pennington* immunity. *California Motor Transport*, 404 U.S. at 515; *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) (conspiracy with licensing authority to eliminate a competitor); *Clipper Exxpress v. Rocky Mountain Motor Tariff*, 690 F.2d 1240, 1263 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471-72 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).

The undisputed evidence before the courts below showed a plan to eliminate CERF and the increased competition is created. When agreement alone was not enough, petitioners conceived their lawsuit as the bludgeon, the "two-by-four" (CR 317, pp 1:2-2:14), the "coercion from the outside" (DX KW), to achieve the unlawful goal. *Noerr-Pennington* does not protect such conduct. Note, 86 *Harv. L.Rev.* 715, 732-35 (1973).

B. Petitioners' Lawsuit Was Baseless and a Sham

A lawsuit may violate the antitrust laws even though brought with probable cause under a colorable claim. *Grip-Pak, Inc. v. Illinois Tool Works, supra*, 694 F.2d 466. Petitioners' suit was not even colorable, but was sham under any standard.

Petitioner's claims failed to survive summary judgment and directed verdict (*Rickards I*, 704 F.2d 1449). This total failure of proof is evidence not only that the claims were baseless, but also evinces petitioners lack of good faith in bringing the action. *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 841, n.13 (9th Cir. 1980); *Clipper Exxpress*, 690 F.2d at 1254; *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983); *U.S. Audio &*

Copy Corp. v. Philips Business Systems, Inc., 1983-1 Trade Cases ¶ 65,364 at 70,174 (N.D. Cal. 1983).[4]

Here, the reasons for dismissal of petitioners' claims show that their primary purpose was to coerce, as Rickards admitted (DX KW; CR 317:1-2). At the time CERF filed its motion for summary judgment against petitioners' claim, "less than two weeks before trial, appellants had neither identified their expert witnesses nor designated documents supporting their damage claims." *Rickards I*, 704 F.2d at 1452. Additionally, petitioners never pursued their appeal of dismissal of their claims against AVMA and ACVO (CR 323, 404), showing that there was no basis for the lawsuit and that its purpose was not to reform the qualification standards, but to eliminate CERF as a competitive threat. As the district court observed, petitioners' claims were "in this Court's opinion, illustrative of the fact that anybody who has $65 for a filing fee can come into court and litigate" (30 RT 547:4-11).

The district court also correctly recognized the bad faith premise of petitioners' lawsuit. What petitioners claimed to be illegal was what they wanted for themselves: a "New College" which would admit petitioners without examination and from which they would then exclude others (DX KQ; 26 RT 4968:3-24; 29 RT 5313:11-19; 29 RT 5342:24-5348:15). As Rickards put it, "This should not be a time for exclusion . . . At some time in the future [we] could adopt a much more stringent policy . . . ." (DX KW).

C. Petitioners' Peculiar Preemption Argument

Without citation to any authority, petitioners argue that the existence of state common law rights preempts federal antitrust jurisdiction (Pet. 12). A variation of the argument was made and rejected in *Gibons v. Ogden*,

[4] The Petition neglects this fact (Pet. 12).

22 U.S. (9 Wheat.) 1 (1824). There is no need to reexamine law settled since Chief Justice Marshall's decision.

In any event, there is nothing contradictory or illogical with supplementing tort liability for an abusive and malicious lawsuit with federal antitrust liability when that lawsuit is used as an anticompetitive weapon.

CONCLUSION

Both courts below were correct. On the undisputed factual record, "This kind of litigation deserves all the chilling effect the law allows." *Rickards II*, 783 F.2d at 1334.

The Petition for a Writ of Certiorari should be denied or if granted, the Ninth Circuit should be summarily affirmed.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 98-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 79 3053 SAW (Judge Woodruff)

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN,
Plaintiffs,

vs.

CANINE EYE REGISTRATION FOUNDATION, INC.,*et al.*,
Defendants.

CANINE EYE REGISTRATION FOUNDATION, INC.,
LAWRENCE M. TRAUNER and DOLLY B. TRAUNER,
Counterclaimants,

vs.

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN,
Counterclaim Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: (1) DISMISSAL OF PLAINTIFFS' ANTITRUST INJUNCTIVE CLAIMS; AND (2) DIRECTED VERDICT ON PLAINTIFF'S CLAIMS FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE

The above-entitled matter came on regularly for trial July 6, 1981 before the Honorable Owen E. Woodruff,

Chief United States Magistrate, the parties having on June 24, 1980 waived their right to proceed before a Judge of the United States District Court and having consented pursuant to Title U.S.C. § 636(c) to a United States Magistrate conducting all proceedings in the case, including trial and entry of judgment. At trial, plaintiffs were represented by Joseph M. Alioto, Lawrance G. Papale and Russell F. Brasso of the firm of Alioto & Alioto, San Francisco, California. Defendants Lawrence M. Trauner, Dolly B. Trauner and Canine Eye Registration Foundation, Inc. were represented by Forrest A. Hainline, III and William J. Taylor of the firm of Brobeck, Phleger & Harrison, San Francisco. Defendants Ralph C. Vierheller, Alan D. MacMillan, David E. Lipton, Dennis D. Olin and Randall H. Scagliotti were represented by Josef D. Cooper and Kirk A. McKinney of the Law Offices of Josef D. Cooper, P.C., San Francisco.

Plaintiff's complaint alleges violations of §§ 1, 2 of the Sherman Act, Title 15 U.S.C. §§ 1, 2, corresponding California antitrust provisions, and the common law tort of intentional interference with prospective business advantage. Plaintiffs seek damages and injunctive relief.

Trial was to a jury on plaintiff's common law damage claims and to the Court on plaintiffs' claims for injunctive relief under the California and federal antitrust laws, the Court having on June 24, 1981 granted defendants' motion for summary judgment against plaintiffs on their state and federal antitrust damage claims.

After plaintiffs completed presentation of their evidence, defendants moved for dismissal of plaintiffs' antitrust injunctive claims under Rule 41(b), F.R.Civ.P., on the ground that plaintiffs had not shown any right to injunctive relief upon the proven facts and the law. The Court as trier of the facts on these claims then determined them and granted defendants' motion to dismiss. While the Court had initially indicated that a jury would

be used in an advisory capacity on plaintiffs' injunctive claims, pursuant to Rule 39(c), F.R.Civ.P., because of potential overlap of factual issues on plaintiffs' antitrust injunctive and common law damage claims, the Court finds resort to such jury unnecessary for the injunctive claims in light of the disposition of the damage claims set forth below.

These Findings of Fact and Conclusions of Law are made on plaintiffs' claims for injunctive relief under the federal and state antitrust laws pursuant to Rule 52(a), F.R.Civ.P., and also in support of the Court's determination that plaintiffs have not presented substantial evidence that could support a reasonable jury findings awarding plaintiffs damages on their common law claims for intentional interference with prospective business advantage, and that accordingly a verdict must be directed for defendants on such pendent claims.

For purposes of the injunctive claims, the Court has fully considered plaintiffs' evidence, the testimony and demeanor of plaintiffs' witnesses and the governing law. For purposes of the common law damage claims, the Court has drawn in plaintiffs' favor all inferences which a reasonable jury could make, considering the evidence as a whole.

The Court, being fully advised, now makes the following:

I

FINDINGS OF FACT

I.1. The plaintiffs in this action are:

(a) Dr. D.A. Rickards, a veterinarian who has practiced in Cleveland, Ohio since 1963;

(b) Dr. M.A. Custer, a veterinarian who has practiced in San Diego, California since 1959;

(c) Dr. Paul V. Belkin, a veterinarian who has practiced in St. Louis, Missouri since 1952; and

(d) Dr. John S. Sleasman, a veterinarian who has practiced in Bremerton, Washington since 1973.

I.2. Defendants are:

(a) Canine Eye Registration Foundation, Inc. ("CERF"), a California non-profit corporation formed in 1974, with its principal place of business in San Francisco, California.

(b) Lawrence M. Trauner, M.D., a retired doctor who resides in San Francisco, and is president and a director of CERF.

(c) Mrs. Dolly B. Trauner, a resident of San Francisco, California, the Secretary/Treasurer and a director of CERF.

(d) Dr. Ralph C. Vierheller, a veterinarian who has practiced in La Habra, California since 1975.

(e) Dr. Alan D. MacMillan, a veterinarian who has practiced in San Diego, California since 1978.

(f) Dr. David E. Lipton, a veterinarian who has practiced in Richmond, California since 1974.

(g) Dr. Dennis D. Olin, a veterinarian who has practiced in Stockton, California since 1976.

(h) Dr. Randall H. Scagliotti, a veterinarian who has practiced in Sacramento, California since 1977.

I.3. Each plaintiff and each veterinarian defendant is a member of the American Veterinary Medical Association ("AVMA"), a professional organization representing the vast majority of American veterinarians. The AVMA, among other things, sanctions specialty boards in various areas of veterinary medicine, and in so doing, represents to the lay public that members of recognized specialty boards are in fact specialists and have proven themselves especially well qualified in particular areas of veterinary medicine.

I.4. The American College of Veterinary Ophthalmologists ("ACVO") is the specialty board recognized by the AVMA as being comprised of veterinarians who possess and have established their special training, skill and competence in veterinary ophthalmology. AVMA has recognized no veterinarians except members of ACVO as possessing special training, skill and competence in veterinary ophthalmology. Defendants Vierheller, Olin, Lipton, MacMillan and Scagliotti are members of ACVO. None of the plaintiffs are members of ACVO.

I.5. ACVO was formed in 1970. In 1972 and continuing to the present, under the aegis and general supervision of the AVMA, AVCO has administered an entrance examination to test the knowledge and achievement of persons who (a) have presented their credentials for admission into ACVO, and (b) have had their credentials approved by the ACVO Credentials Committee pursuant to its operating procedures and guidelines. The multi-phase examination has been administered annually with a written Qualifying Examination and a subsequent Oral and Practical Examination administered to those who pass the Qualifying Examination. The Qualifying Examination is not intended to evaluate a candidate's achievement in only those areas of knowledge necessary for performing a screening examination for detecting hereditary canine eye defects. Rather, the Qualifying Examination is designed to test the candidate's achievement level in the area of veterinary ophthalmology as a whole. The ACVO examination has been fair and impartial. Approximately 84% of the persons who have taken the ACVO Qualifying Examination have ultimately passed it.

I.6. Neither Dr. nor Mrs. Trauner, nor any officer or director of CERF, is a veterinarian or has any training in veterinary medicine. No officer or director of CERF ever had any connection with the formation or operation of ACVO, or with the ACVO examinations.

I.7. CERF was incorporated on November 12, 1974 as a non-profit, tax-exempt, charitable corporation. Its purposes, as stated in its 1974 Constitution, include: "To collect, collate and disseminate information concerning hereditary eye diseases in dogs by establishing a Registry for the listing of purebred dogs of those breeds which are susceptible to hereditary eye diseases, which have been examined and diagnosed as being phenotypically asymotomatic for these diseases at the time of examination by a Board certified veterinary ophthalmologist or by a veterinarian who has been designated by the American College of Veterinary Ophthalmologists, or a committee thereof, as being qualified by post-graduate training in canine ophthalmology to perform such examinations."

I.8. Beginning in late 1975, CERF issued "certificates" to owners of dogs whose eyes had been examined by certain veterinarians and found asymotomatic (or "clear") of major hereditary eye defects at the time of the examination. A certificate was only issued if (a) the examination was performed by an ACVO member, using the examination form provided to the examiners free of charge by CERF; (b) the ACVO examiner returned one copy of the CERF form directly to CERF; (c) the dog owner sent to CERF the original, ink-signed copy of the form (indicating the dog was "clear" of major hereditary defects at the time of the examination) and a registration fee of $5.00; and (d) at the time of the examination, the dog satisfied the "minimum ages" criteria established for certification of certain breeds.

I.9. Whether or not the dog's owner ever applied for a certificate, CERF collected information regarding the examination from the individual examining veterinarians, and tabulated such results in periodic reports which CERF disseminated to veterinarians, breeders, dog clubs and researchers. Additionally, more detailed information

regarding specific eye examinations was available from CERF upon request.

I.10. ACVO members and a special ACVO committee provided CERF with scientific advice regarding, e.g., nomenclature for specific diseases, determination of which diseases disqualified a dog from certification and the design of the examination form. An ACVO committee, and subsequently the ACVO, approved the scientific aspects of the CERF examination form, and individual ACVO members used CERF examination forms and returned copies thereof to CERF for inclusion in its data.

I.11. CERF's decision to accept examination reports only from ACVO diplomates (or "designates") was made unilaterally by CERF, without consultation with any member of ACVO. No member of ACVO gave advice to CERF on its Constitution or By-laws, or saw the CERF Constitution or By-laws before they were filed with the California Secretary of State. Thereafter, individual members of ACVO and other veterinarians (including certain defendants and plaintiffs) suggested to CERF that it establish criteria which would allow more veterinarians to perform eye screening examinations which would be acceptable to CERF. CERF declined to do so, motivated by reasons of quality control and its own inability to develop such criteria.

I.12. The ACVO never designated any non-ACVO member to CERF, although some members of ACVO were in favor of doing so. The ACVO determined that it was not its function to appoint "designates" for any other organization, and that its charter from the AVMA did not permit it to test for and/or recognize expertise in veterinary ophthalmology except through the ACVO membership process itself, as described in Paragraph 5, above.

I.13. CERF never accepted examination reports prepared by persons not members of ACVO. CERF applied

its examiner requirements in a uniform and even-handed manner, and refused to accept examination reports even from veterinarians Mrs. Trauner personally believed to be competent, but who had not objectively demonstrated their competence through the peer review procedures necessary for membership in ACVO. CERF would have accepted examination results for its program from any veterinarian (including plaintiffs) who demonstrated special skill, training and competence in veterinary ophthalmology by satisfying the requirements for membership in AVCO.

I.14. CERF offered a new service and product. Prior to CERF's incorporation, there had never been an all-breed eye registry which accumulated reliable examination data and offered verification to dog owners and breeders that an examination had been performed by a reliable examiner.

I.15. Dog breeders and veterinary researchers used and relied upon the CERF program and its data because CERF's examiners were known to be competent by an objective standard. Without an assurance that the CERF certificate signified an examination done by a qualified examiner (i.e., an ophthalmic specialist), the certificates would have had no value to breeders or owners of dogs. Unless researchers could be assured that the examinations had been performed by a reliable expert in ophthalmology, CERF's data compilation would be meaningless for scientific or research purposes.

I.16. CERF chose to accept examination results only from ACVO members in order to insure the quality and accuracy of its data and the reliability of its certificates. There is no evidence from which a reasonable jury could conclude that CERF's determination to use only ACVO examiners was motivated or intended to injure any veterinarian or interfere with any veterinarian's practice or livelihood.

I.17. Not all veterinarians are competent to perform eye screening examinations to detect the presence or absence of hereditary disease, including some veterinarians who claim to be competent in this specialized field. Non-veterinarians, including this Court, lack the expertise either to perform eye examinations for the CERF program or to identify which veterinarians have the necessary expertise.

I.18. No veterinarians except members of ACVO have ever been identified by name to the lay public by the AVMA, or any other veterinary organization, as being competent in veterinary ophthalmology. No test was ever devised and suggested to CERF by any segment of the veterinary profession as a means of identifying competent veterinary ophthalmologists, except the membership procedure of ACVO.

I.19. No plaintiff is a member of ACVO. Dr. Rickards sat for the Qualifying Examination seven times and failed each time. Dr. Belkin's credentials were rejected by the Credentials Committee in 1975 because he had failed to adequately communicate sufficient breadth of knowledge in his submitted case reports; Dr. Belkin never reapplied to the ACVO, although he was invited to do so. Neither Dr. Custer nor Dr. Sleasman ever applied to become ACVO members.

I.20. No plaintiff has objectively demonstrated by any process of peer review that he has special training, skill or competence in veterinary ophthalmology.

I.21. No entry barriers prevented plaintiffs or anyone else from establishing an eye registry program in competition with CERF.

I.22. CERF ceased its registration activities on June 1, 1979. During its existence, approximately 90,000 eye examinations were performed using CERF examination were performed using CERF examination forms, including re-examinations of the same animal. The maximum

of 90,000 dogs examined for a CERF certificate is but a small fraction of the total number of pure-breed dogs in the United States. The owners of only 8,900 dogs, or less than 10% of the total dogs examined using a CERF examination form, ever applied to CERF for issuance of a certificate.

I.23. On one occasion, Mrs. Trauner requested ACVO members for information on the fees they charged for eye screening examinations. No ACVO member defendant provided any fee information to her. Mrs. Trauner never communicated to anyone the fee information she received from some ACVO members.

I.24. There is no evidence of any agreement by or among defendants, or any of them, to fix prices. No evidence has been presented which might even suggest discussions or agreements among ACVO members regarding fees to be charged, and the charges by ACVO members for eye screening examinations frequently varied as much as 50%, between $5.00 and $7.50 per dog, and some examiners received nothing on certain occasions, some recouped only a portion of their travel expenses, and some received as much as $10.00 per dog.

I.25. The CERF certificate is a statement that an examination was performed by an ACVO member, the dog was found to be free of phenotypic signs of genetic eye disease, and the results of the examination were reported to CERF. The CERF certificate, the CERF examination form and the examination performed by an ACVO member for issuance of such certificate constitute a single product, and not separate and distinct products.

I.26. CERF had no financial interest in either the examinations performed or the use of the CERF examination form. CERF distributed its examination forms free of charge and did not share in any examination fee charged by an examiner. Neither Dr. nor Mrs. Trauner received any remuneration for their activities on behalf

of CERF, and no veterinarians received any remuneration from CERF for either providing scientific advice or sending data to CERF.

I.27. When CERF ceased its registration functions on June 1, 1979, it requested that unused examination forms be returned. Except for a short transition period necessary for certain examiners to order different forms for their own use, there is no evidence that any veterinarian defendant has used or even retained a CERF form since CERF's registration activities were discontinued.

I.28. There is no evidence regarding whether, under what circumstances or in what manner CERF would resume its discontinued registration activities.

I.29. A jury could not reasonably conclude that any plaintiff ever offered (or sought to offer) to clients any registration and/or third-party verification services for genetic ophthalmic screening examinations of purebreed dogs, such as CERF offered. Before, during and after CERF, plaintiffs offered certain other ophthalmic services to clients. Breeders have continued to deal with plaintiffs for such services, and other veterinarians continue to refer clients to plaintiffs for such services.

I.30. There is no evidence from which a reasonable jury could conclude that any defendant even knew he was performing veterinary services for any former customer of any plaintiff, or that any defendant knowingly and consciously undertook to injure any plaintiff, motivated by any intent or desire to interfere with any potential relationship between any plaintiff and any potential client.

I.31. There is wholly insufficient evidence from which a reasonable jury could conclude that any plaintiff has established, with reasonable certainly, the amount of damages proximately caused by any act of any defendant. Any such award by a jury would be based upon specula-

tion, conjecture and guess, and not on the evidence at trial.

I.32. The Court finds as a fact each matter hereafter set forth in its conclusions of law which may constitute a finding of fact or a mixed finding of fact and conclusion of law.

II

CONCLUSIONS OF LAW

II.1. This Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1337 with respect to plaintiffs' federal antitrust claims, and pendent jurisdiction over the California antitrust and common law claims. The Court has personal jurisdiction over defendants CERF, Dr. and Mrs. Trauner, and Drs. Vierheller, Olin, Lipton, Scagliotti and MacMillan, and has previously determined it does not have personal jurisdiction over ACVO, AVMA or non-resident members of ACVO formerly named as defendants herein.

II.2. Defendants did not combine, conspire or agree to restrain trade, and the CERF programs and defendants' participation therein did not violate federal or California antitrust laws. CERF's determination to deal with only ACVO members for its registry did not constitute a group boycott, but rather an exclusive dealing arrangement. Exclusive dealing arrangements are not *per se* violations of the antitrust laws. Such claims must be evaluated under the Rule of Reason, i.e., whether such agreements constitute an unreasonable restraint of trade.

II.3. The burden of proving that a restraint is unreasonable is part of the plaintiffs' case-in-chief. Plaintiffs must establish a relevant market within which the alleged restraint operated, and that the alleged restraint was unreasonable given all the facts and circumstances. Relevant factors include the history of the restraint, the evil believed to exist, the reason for adopting the particu-

lar remedy, and the purpose or result to be obtained. Rules based upon concerns of quality and quality control are not anticompetitive and are therefore reasonable. Plaintiffs have not proven any relevant market narrower than the rendering of veterinary services in general. Nevertheless, under all of the facts and circumstances of this action, and regardless of the relevant market utilized, CERF's determination was not unreasonable, or adopted for anticompetitive reasons, and had no unreasonable effect on competition in the relevant market.

II.4. The inaction of plaintiffs Sleasman, Custer and Belkin in failing to apply for ACVO membership within the four years preceding their complaint bars their antitrust claim for CERF's refusal to deal with them. Essential to a successful claim of refusal to deal is a showing by plaintiffs that they made a demand of the defendants and were refused, unless such a demand would be futile.

II.5. Defendants did not combine, conspire or agree to fix prices. To establish a price-fixing conspiracy, plaintiffs must show more than merely an attempt to gather price information. Moreover, plaintiffs have no standing to claim injury from the price-fixing alleged in the complaint.

II.6. There was no unlawful tie of the CERF registration to the use of the CERF examination form and/or services performed by an ACVO member. To establish an illegal tie-in arrangement, plaintiffs must establish that there are two distinct products or services, and that the seller of the tying product had an economic interest in the tied product.

II.7. Defendants did not attempt to monopolize or conspire to monopolize trade and commerce in violation of Section 2 of the Sherman Act, Title 15 U.S.C. § 2, or parallel state provisions. To establish a claim under Sherman Section 2, plaintiffs must establish (a) specific

intent to control prices or destroy competition in some part of commerce; (b) predatory or anticompetive conduct directed to accomplishing an unlawful purpose; and (c) a dangerous probability of success. Plaintiffs have failed to establish any of these elements.

II.8. Dissolution of CERF is not a proper or available remedy in private actions under the antitrust laws. The Court lacks personal jurisdiction to enter an injunction against ACVO or any other non-defendant.

II.9. To establish the propriety of other injunctive relief against the present defendants, plaintiffs must carry a heavy burden of showing (a) a past or impending violation of antitrust laws; (b) a continued threat or danger in the future as a result of an ongoing violation; (c) that the requested relief can be conveniently and effectively administered; and (d) that the balance of the public interest requires the relief. Plaintiffs must show more than just a mere possibility of recurrence of the alleged violation; plaintiffs must show a substantial probability or danger of recurrence. Plaintiffs have satisfied none of these elements, and are not entitled to injunctive relief on their state or federal antitrust claims.

II.10. The correct standard for the granting of a motion for a directed verdict is whether or not, viewing the evidence as a whole, plaintiffs have presented *substantial* evidence that could support a finding, by reasonable jurors, for plaintiffs. Plaintiffs have not satisfied this lenient standard.

II.11. The tort of intentional interference with prospective business advantage requires plaintiffs to establish each of the following five elements: (1) specific economic relationship with an identifiable third party containing the probability of economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed and motivated to disrupt the

relationship; (4) actual disruption of the relationship; and (5) reasonably certain damages to plaintiff, proximately caused by the acts of defendants. Plaintiffs must establish culpable intent by defendants. Plaintiffs have not presented substantial evidence from which a jury could reasonably conclude that plaintiffs had such a specific relationship (involving an examination done for purposes of the CERF program) with identifiable third-persons within the two years preceding the complaint, that defendants knew of such relationships, or that defendants acted with the requisite culpable or exclusionary intent. Moreover, if defendants' conduct is reasonable for purposes of Section 1 of the Sherman Act, such a finding precludes recovery for claims of unlawful interference with prospective business advantage.

II.12. Damages for this tort must be proven with reasonable certainty, and not through evidence which renders the alleged damages uncertain, speculative, or remote. There is no evidence from which a jury could reasonably award damages to plaintiffs on account of the alleged tort, even if the other elements had been satisfied.

II.13. The Court makes as a further conclusion of law anything set forth above as a finding of fact which is a conclusion of law or a mixed finding of fact and conclusion of law.

Counsel for defendants are directed to prepare an appropriate form of judgment in accordance with the above findings and conclusions.

DATED: September 30, 1981
San Francisco, California

/s/ Owen E. Woodruff, Jr.
HON. OWEN E. WOODRUFF, JR.
Chief United States Magistrate

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 81-4668

D. A. RICKARDS, M. A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN,
Plaintiffs/Appellants,

v.

CANINE EYE REGISTRATION FOUNDATION, INC., LAWRENCE M. TRAUNER, DOLLY B. TRAUNER, DAVID E. LIPTON, ALAN D. MACMILLAN, DENNIS D. OLIN, RANDALL H. SCAGLIOTTI and RALPH C. VIERHELLER,
Defendants/Appellees.

Argued and Submitted Oct. 13, 1982

Decided May 3, 1983

Forrest A. Hainline, III, San Francisco, Cal., for defendants/appellees.

Joseph M. Alioto, Alioto & Alioto, San Francisco, Cal., for plaintiffs/appellants.

Appeal from the United States District Court for the Northern District of California

Before DUNIWAY, Senior Circuit Judge, and BOOCHEVER, Circuit Judge and KEEP,* District Judge.

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* Honorable Judith N. Keep, District Judge for the Southern District of California, sitting by designation.

KEEP, District Judge:

On October 31, 1979, plaintiffs (hereinafter referred to as appellants) filed a complaint seeking damages and injunctive relief, alleging that defendants (hereinafter referred to as appellees) violated both the Sherman Act, 15 U.S.C. §§ 1-2 (1976) and various California antitrust laws,[1] and committed the common-law tort of intentional interference with prospective economic advantage. The parties stipulated to trial before a magistrate. On June 22, 1981, two days before trial, the magistrate heard appellees' motions *in limine* and for summary judgment. Appellees' motion *in limine*, requesting an order precluding appellants from offering at trial testimony from experts not designated in the "Joint Pretrial Statement," was granted. In light of his ruling on the motion *in limine*, the magistrate then granted appellees' summary judgment motion as to the antitrust damages claims.

On June 24 1981, the case proceeded to trial on the antitrust claims for injunctive relief and the common-law interference with prospective economic advantage claim. The common law claim was tried to a jury sitting in an advisory capacity, and the injunctive claims were tried to the magistrate. After appellants concluded their presentation of evidence, appellees moved for a directed verdict on the common law claim pursuant to Fed. R. Civ. P. 50(a), and dismissal of the injunctive claims pursuant to Fed. R. Civ. P. 41(b). The magistrate granted both motions. We affirm.

I. FACTS

The Canine Eye Registration Foundation ("CERF") is a non-profit, tax-exempt, charitable organization. None of CERF's officers or directors is a veterinarian. According to its constitution, CERF's purpose is to collect, col-

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[1] Cal.Bus. & Prof.Code §§ 16700-16703 (West 1964 & Supp. 1982); *Id.* §§ 16720-16727.

late, and disseminate information concerning hereditary eye diseases in dogs by establishing a registry listing purebred dogs of those breeds that are susceptible to hereditary eye diseases. CERF requires dogs to be examined by veterinarians certified by the American College of Veterinary Ophthalmologists ("ACVO") before listing the dogs in its registry. ACVO members evaluate the dogs using forms provided by CERF. The ACVO veterinarian then returns one copy of the form to CERF, and, if the owner remits the original to CERF with a $5.00 registration fee, CERF issues to the owner a certificate indicating whether the dog suffers from hereditary eye defects. Regardless of whether the owner sends the original and the fee to CERF, the information from the examining veterinarian is tabulated and made available to dog breeders and researchers around the country.

Veterinarians wishing to become ACVO-certified specialists in veterinary ophthalmology must pass a series of tests devised by ACVO under general guidelines established by the American Veterinary Medical Association.[2] The applicant first presents his or her credentials to ACVO. If the applicant's qualifications meet ACVO's Credential Committee's standards, the applicant must then take and pass written, oral, and practical qualifying exams before receiving ACVO certification. Approximately 84% of the applicants are ultimately certified.

Appellants herein are veterinarians who could not or did not pass ACVO's certification exams,[3] and thus could

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[2] The American Veterinary Medical Association ("AVMA") is a veterinary's professional society. It recognizes other societies that represent various groups of veterinary medicine specialists. One such specialty is ACVO. AVMA recognizes no other group in the area of veterinary ophthalmology.

[3] All of the appellants are veterinarians. Dr. D.A. Rickards has practiced in Cleveland, Ohio since 1963. He sat for ACVO's written exam seven times and failed each time. Dr. Paul Belkin has practiced in St. Louis since 1952. His credentials were rejected by

not perform canine eye examinations that CERF would list in its registry. The thrust of appellants' complaint is that through a combination or conspiracy between ACVO and CERF, appellants were precluded from performing eye-screening examinations. They allege CERF and ACVO engaged in a group boycott, and an illegal tying arrangement whereby the issuance of a CERF Registration Certificate was tied to the use of the CERF form and the examination performed by a member of ACVO. Appellants also allege that appellees engaged in price-fixing since all ACVO members performing eye-screening exams charged between $5.00 and $7.50, allegedly at the suggestion of CERF. Appellants claim that defendants combined and conspired to prevent others from establishing canine eye registries to monopolize the market in eye-screening examinations. Appellees allegedly engaged in the following exclusionary practices: preventing non-members of ACVO from performing the eye exams and falsely implying that non-specialists were not as competent as ACVO certified ophthalmologists. Finally, appellants claim the above mentioned conduct violated California unfair competition laws and constituted an intentional interference with prospective business advantage.

II. DISCUSSION

Appellants raise three issues before this Court. They first argue that the magistrate improperly granted appellees' motion for summary judgment on the antitrust damages claim. After viewing the record in its entirety, we hold that summary judgment was properly granted. Even though summary judgment is not particularly favored in antitrust litigation, *Poller v. CBS*, 368 U.S. 464,

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ACVO's Credential Committee in 1975. He has not resubmitted his credentials although invited to do so. Dr. M.A. Custer has practiced in San Diego since 1959, and Dr. John S. Sleasman has practiced in Washington since 1973. Neither Dr. Custer nor Dr. Sleasman has ever applied for ACVO membership.

467, 473, 82 S.Ct. 486, 488, 491, 7 L.Ed.2d 458 (1962); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 668 (9th Cir. 1980), summary judgment was properly granted here. At the time the motion was filed, less than two weeks before trial, appellants had neither identified their expert witnesses nor designated documents supporting their damages claims. There thus was no competent or relevant evidence from which a jury could fairly estimate damages, *see Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 863 (N.D. Cal. 1979), *aff'd sub nom. Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), and appellees were thus entitled to judgment on the damages issue as a matter of law. *See Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir.), *cert. denied.* 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 109 (1981).

Appellants next argue that the magistrate improperly granted appellees' motions to dismiss the antitrust injunctive claims and for a directed verdict on the common-law claim of tortious interference with prospective economic advantage. We discuss these in turn.

A. *The Motion to Dismiss.*

At the close of appellants' case, appellees brought a motion to dismiss pursuant to Rule 41(b)[4] which was

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[4] Fed.R.Civ.P. 41(b) provides in part that "[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."

granted. When a trial court finds against the plaintiff on a Rule 41(b) motion, it is required to make findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).[5] Appellants claim here that they are entitled to a *de novo* review of the facts because the magistrate adopted findings drafted and submitted by the appellees. The fact that the magistrate adopts findings prepared by the prevailing party does not by itself necessitate a *de novo* review; however, the magistrate's findings will be more carefully scrutinized in such cases. *Photo Electronics Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978). The clearly erroneous standard still applies, and this Court will overturn the magistrate's findings only if the record firmly convinces us that a mistake has been made.

1. *The Sherman Act Section 1 violations.*

In granting the motion to dismiss, the magistrate first concluded that appellants demonstrated no right to relief under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[6] Appellants contend that they proffered evidence substantiating group boycott, price-fixing, and tie-in claims which constitute per se violations of Section 1. We reject this contention. To prove a violation of Section 1, appellants must show a contract, combination, or conspiracy in restraint of trade. On the record before this Court there is insufficient evidence of an agreement. CERF's decision to accept canine hereditary eye examination data exclusively from ACVO-certified veterinari-

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[5] Fed.R.Civ.P. 52(a) provides in part that [i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

[6] 15 U.S.C. § 1 provides in part that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

ans was unilaterally made, and was based on considerations of quality control and reliability. It is true that ACVO formed a committee to provide scientific information to CERF because CERF's officers and directors are lay persons, and, that prior to its incorporation, CERF consulted ACVO on the feasibility of an eye registry. There was, however, no evidence that ACVO participated in either the formulation of CERF policy or the drafting of CERF's constitution. In fact, once CERF publicized its decision to limit its registry to examination data prepared by ACVO members, some ACVO members voiced their disapproval. There was an understanding between ACVO and CERF that ACVO would supply CERF scientific information and guidance on medical issues but this understanding does not rise to the level of an agreement violative of Section 1 of the Sherman Act.

Even if there were sufficient evidence of an agreement, the record before us demonstrates that the "agreement" amounts to nothing more than a type of exclusive dealership agreement: CERF provided examination forms only to ACVO members and would accept no other type of form for inclusion in its registry. The reason justifying this CERF-ACVO relationship is valid. ACVO members are the only veterinarians who have objectively demonstrated that they are qualified to perform the hereditary eye examinations. Obviously, examination reliability is of utmost concern to CERF.

This type of exclusive dealership arrangement, without more, is not violative of Section 1 of the Sherman Act. As the court stated in *Determined Productions, Inc. v. R. Dakin & Co.*, 514 F.Supp. 645, 646 (N.D. Cal. 1979), *aff'd mem.*, 649 F.2d 866 (9th Cir. 1981):

> We must begin with the well-settled proposition that a trader has the right to deal or refuse to deal with whomever he pleases for reasons sufficient to him-

> self. [citations omitted] A refusal to deal is not unlawful unless it implements an arrangement to restrain trade by, for example, enforcing price maintenance, barring a competitor from a market or maintaining a dominant market position. *See, Bushie v. Stenocord,* 460 F.2d 116, 119 (9th Cir. 1972).

In *GTE Sylvania, Inc. v. Continental T.V., Inc.,* 537 F.2d 980, 997 (9th Cir. 1976) (en banc), *aff'd,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), this Court noted that "[t]here is a veritable avalanche of precedent" holding that exclusive dealing, without more, does not show a violation of the antitrust laws. The record demonstrates that CERF's policy of providing examination forms exclusively to ACVO members and accepting results only from them, is nothing more than a form of exclusive dealership. Accordingly, the magistrate's conclusion that CERF and ACVO did not enter into an agreement violative of Section 1 of the Sherman Act is correct.

Since there was no agreement between CERF and ACVO members to exclude nonmembers, there is nothing in the record supporting appellants' group boycott theory. A claim of concerted refusal to deal obviously cannot stand without evidence of concert. *Cleary v. National Distillers & Chemical Corp.,* 505 F.2d 695, 697 (9th Cir. 1974) (per curiam). An individual distributor acting alone has the right to deal with whomever he pleases. *Id.*

Appellants' price-fixing claim similarly is left unsubstantiated by the record. The record shows that examining veterinarians never discussed fees with CERF, that examination prices charged by the ACVO-certified veterinarians ranged from $5.00 to $7.50, and that CERF provided the exam forms free of charge to ACVO veterinarians. Although CERF directors apparently made several inquiries regarding fees, the inquiries were unanswered. Isolated requests for price information, how-

ever, do not a price-fixing claim make, *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982), and the magistrate was thus justified in granting the motion to dismiss the price-fixing claim.

Finally, appellants' tie-in theory must likewise be rejected. Appellants contend that appellees "tied" the issuance of a CERF Registration Certificate to the use of a CERF Examination Form and service by an ACVO member. To establish an unlawful tying arrangement, appellants must offer proof that there are two separate products, and that the sale of one (the tying product) has been conditioned upon the purchase of the other (the tied product). *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613-14, 73 S.Ct. 872, 883, 97 L.Ed. 1277 (1953); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d at 1352; *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 47 (9th Cir. 1971), *cert. denied*, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972). In examining a tie-in claim, this Court must consider whether the seller of the tying product (the CERF certificate) harbors an economic interest in the tied product (the use of the CERF examination form and the performance of services by an ACVO member). *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977). The CERF examination forms were provided to the veterinarians free of charge. The fee charged by the veterinarians did not benefit CERF in any way. From the state of the record, the magistrate correctly ruled that CERF, the seller of the tying product, harbored no economic interest in the tied product.

In sum, we hold that the magistrate properly granted appellees' motion to dismiss. The record fails to support appellant's contentions that the parties entered into an "agreement" violative of Section 1 of the Sherman Act. Appellants' group boycott, price-fixing and tie-in claims are unsubstantiated by the record. We next turn to appellants' Section 2 claim.

2. *The Sherman Act Section 2 violations.*

Under Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976),[7] appellants carry the burden of showing: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. *California Computer Products v. IBM*, 613 F.2d 727, 736 (9th Cir. 1979). Appellants' claim fails on the first requirement. There is no evidence of specific intent to control prices or destroy competition. While specific intent may be inferred from substantial anticompetitive conduct, *Forro Precision, Inc. v. IBM*, 673 F.2d 1045, 1059 (9th Cir. 1982), the record in the instant case reveals pro-competitive conduct. Setting minimum standards to insure quality increases competition and is entirely reasonable.

This Court's opinion in *Deesen v. The Professional Golfers' Association of America*, 358 F.2d 165 (9th Cir. 1966) *cert. denied*, 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966) is instructive. In *Deesen*, plaintiff, a professional golfer, claimed that defendants engaged in a combination or conspiracy to monopolize professional golf tournaments and to boycott him. The PGA maintained proficiency requirements for players wishing to enter PGA tournaments. The requirements were justified by the PGA's interests in fostering competition and in preventing tournament overburdening by players of inferior ability. The court found the PGA's conduct entirely reasonable. Just as the PGA set certain requirements to insure high quality golf tournaments, CERF established objective criteria to measure competence in the field of veterinary ophthalmology. Just as the PGA treated all

[7] 15 U.S.C. § 2 provides in part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ."

golfers similarly, CERF applied its policy in an even-handed manner. In both cases, the conduct complained of what procompetitive and not anticompetitive. Thus, with neither direct nor inferential evidence of specific intent to monopolize, appellants' Section 2 claim must fall. The facts are plainly insufficient to support the claim, and it is therefore unnecessary to consider the other Section 2 requirements. The dismissal of all the antitrust claims was clearly warranted.[8]

B. *The Directed Verdict.*

In considering whether the magistrate properly granted appellees' motion for directed verdict, pursuant to Fed. R. Civ. P. 50(a), this Court must determine, by viewing the evidence as a whole, whether appellants presented substantial evidence that could support a finding in their favor by reasonable jurors. *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir. 1974). If appellants fail to present sufficient evidence, the court must direct a verdict in appellees' favor. *Id.*

The magistrate directed a verdict on the tortious interference with prospective economic advantage claim. To prevail on this pendent state-law claim, appellants must establish: (1) the existence of a specific economic relationship between appellants and third parties that may economically benefit appellants; (2) knowledge by the appellees of this relationship; (3) intentional acts by the appellees designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the appellants. *Buckaloo v. Johnson*, 14 Cal.3d 815,

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[8] Appellants' state-law claims under the California Business & Professions Code *see*, footnote 1, *supra*, must be rejected as well. The finding that appellees' conduct is reasonable under the Sherman Act precludes recovery under state law in this instance. *See Bridge Corp. of America v. The American Contract Bridge League Inc.*, 428 F.2d 1365, 1371 (9th Cir. 1970).

827, 537 P.2d 865, 872, 122 Cal.Rptr. 745, 752 (1975). Some identifiable pecuniary or economic benefit must accrue to appellees that formerly accrued to appellants, *De Voto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340, 1348 (9th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980).

Viewing the evidence as a whole, we conclude that several elements of the tortious interference claim were not established, and that the directed verdict was properly granted. First, the evidence fails to support appellants' claim that creation of CERF's canine eye registry disrupted an ongoing economic relationship between appellants and third parties. Several dog owners did testify that they would have retained appellants' veterinary services but for CERF's requirement that only eye exams performed by ACVO-certified veterinarians would be listed in CERF's registry. Appellants argue that this testimony constitutes evidence of specific economic relationships that were disrupted by appellees' conduct. We disagree. The evidence only demonstrates that some owners chose not to retain appellants. Appellants' regular clients sought appellants' veterinary services before and after creation of CERF's registry system and thus the evidence does not show that an *ongoing* business relationship between appellants and their regular clients was somehow disrupted. Further, because appellants did not perform genetic eye-screening exams for purposes of an eye registry, CERF's registry system did not interfere with appellants' specific business relations.

Second, the record is devoid of evidence indicating that appellees intended to disrupt appellants' business relationships with their clients. Appellants state in their reply brief that appellees "knew or should have known" of the economic relationships between appellants and third persons, and that appellees "committed intentional acts designed to disrupt business relationships between non-ACVO plaintiffs and their customers and prospective

customers". Appellants' Reply Brief, p. 5. Proof of these claims, however, does not reasonably support a finding that appellees intended to disrupt appellants' business relationships with third persons. Motive or purpose to disrupt ongoing business relationships is of central concern in a tortious interference case, *Lowell v. Mother's Cake and Cookie Co.*, 79 Cal.App.3d 13, 18, 144 Cal.Rptr. 664, 668 (1978), and a strong showing of intent is required to establish liability. As we said in *De Voto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d at 1347:

> Tortious interference requires a state of mind and a purpose more culpable than the "intent" under the Restatement definition, however. The fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability. Inquiry into the motive or purpose of the actor is necessary . . . . Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly. The extent of liability, for this tort, is fixed in part by the motive or purpose of the actor.

Appellees' conduct is neither criminal nor fraudulent and no aggravating circumstances appear in the record. The record is devoid of *direct* evidence of improper motive or purpose and we will not *infer* such motive merely because appellees "should have known" that creation of their registry injured appellants' business dealings. Further, it is our conclusion that appellees' motive in creating the canine eye registry was proper. CERF's requirement that ACVO-certified veterinarians administer the eye exams was motivated neither by the desire to disrupt appellants' business relations nor by an improper concern for economic reward. Instead, the requirement merely insures that qualified individuals perform the eye

examinations. The proffered evidence thus fails to establish intent to injure appellants' business relations.

Finally, appellants failed to present competent evidence to prove damages. As previously discussed, appellants' damages proof was speculative at best. And since proof of the nature and extent of damages must be reasonably certain before recovery is warranted, *Lucky Auto Supply v. Turner*, 244 Cal.App.2d 872, 883, 53 Cal.Rptr. 628, 634 (1966), appellants' interference with prospective economic advantage claim falls on the damages issue as well.

Viewing the record as a whole, the magistrate was not presented with substantial evidence supporting a finding by reasonable jurors in appellants' favor. Appellants failed to establish several elements of their intentional interference with prospective economic advantage claim, and thus the motion for directed verdict was properly granted.

Accordingly, the magistrate's rulings are hereby AFFIRMED.

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-70-3053-SAW(OEW)

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN and JOHN SLEASMAN,

Plaintiffs,

v.

CANINE EYE REGISTRATION FOUNDATION, INC., (CERF) LAWRENCE M. TRAUNER, DOLLY B. TRAUNER, DAVID E. LIPTON, ALAN D. MACMILLAN, DENNIS D. OLIN, RANDY SCAGLIOTTI and RALPH C. VIERHELLER,

Defendants.

and RELATED ACTIONS

[Filed Mar. 5, 1984]

PARTIAL FINAL JUDGMENT PURSUANT TO RULE 54(b)

In accordance with the provisions of 28 U.S.C. Section 636(c), the parties hereto waived their right to proceed before a Judge of the United States District Court and consented to have a United States Magistrate conduct all proceedings in the case, including trial and order of entry of judgment.

On November 17, 1981, the Court entered a "Partial Final Judgment Pursuant to Rule 54(b) Dismissing with Prejudice All Plaintiffs' Claims Against Defendants Dolly B. Trauner, Lawrence M. Trauner, Caine Eye Registration Foundation, Inc., Ralph C. Vierheller, Alan D. Mac-

Millan, David E. Lipton, Randall H. Scagliotti and Dennis D. Olin." The order and judgment was affirmed by the Ninth Circuit Court of Appeals on May 3, 1983. The United States Supreme Court denied a petition for a writ of certiorari on November 28, 1983.

On February 17, 1984, the Court heard oral argument on cross motions for summary judgment directed to the counterclaims. Counterclaimant Canine Eye Registration Foundation, Inc. ("CERF") moved for summary judgment against the counterclaim defendants on its antitrust claim; counterclaim defendants opposed this motion and moved for summary judgment to dismiss the claim and the claims of CERF and the Trauners for abuse of process and intentional interference with economic relationships. Having fully considered the briefs and arguments of counsel, on February 21, 1984, the Court granted CERF's motion and denied the motions of counterclaim defendants.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Counterclaim defendants D.A. Rickards, M.A. Custer, Paul V. Belkin and John S. Sleasman violated Section One of the Sherman Act, 15 U.S.C. Section One, under both the Rule of Reason and *Per Se* standards.

2. Counterclaim defendants Rickards, Custer, Belkin and Sleasman violated Section Two of the Sherman Act, 15 U.S.C. Section Two, by engaging in a Conspiracy to Monopolize and an Attempt to Monopolize trade or commerce.

3. The lawsuit brought by Rickards, Custer, Belkin and Sleasman was baseless and a sham; it was also brought to further and as part of an overall scheme to violate the antitrust laws.

4. By reason of counterclaim defendants' violations of the antitrust laws, CERF sustained damage in the

amount of $416,893.99, and in accordance with 15 U.S.C. Section 15, shall recover three times this amount and its reasonable attorney's fees.

5. CERF shall have and recover, jointly and severally, from counterclaim defendants Rickards, Custer, Belkin and Sleasman the sum of $1,250,681.90, and its reasonable attorney's fees for the prosecution of its counterclaim in the amount of $35,879.86. Statutory interest on the total judgment shall accrue at the rate of 10% from this date.

6. Pursuant to F.R.Civ.Pro., Rule 54(b), this Court expressly determines that there is no just reason for delay in entering a final, appealable judgment on CERF's counterclaim, and hereby directs the Clerk of the Court to enter forthwith this Partial Final Judgment.

7. Trial on counterclaimants' claims for abuse of process and intentional interference shall proceed as later ordered by this Court.

Dated: March 1, 1984

/s/ Owen E. Woodruff, Jr.
OWEN E. WOODRUFF, JR.
Chief United States Magistrate

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 84-2185

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN
Plaintiffs-Counterdefendants-Appellants.

v.

CANINE EYE REGISTRATION FOUNDATION, INC., LAWRENCE M. TRAUNER and DOLLY B. TRAUNER,
Defendants-Counterclaimants-Appellees.

Argued and Submitted June 12, 1985

Decided Feb. 27, 1986

Joseph M. Alioto, Lawrance G. Papale, Alioto & Alioto, San Francisco, Cal., for plaintiffs-counterdefendants-appellants.

Forrest A. Hainline, III, Timothy A. Ngau, Swidler & Berlin, Washington, D.C., for defendants-counterclaimants-appellees.

Appeal from the United States District Court
for the Northern District of California

Before MERRILL and GOODWIN, Circuit Judges and WILLIAMS, District Judge.*

GOODWIN, Circuit Judge.

D. A. Rickards, M. A. Custer, Paul V. Belkin and John S. Sleasman ("Rickards group") appeal from the grant of summary judgment in favor of Canine Eye Registration Foundation, Inc., Lawrence M. Trauner and Dolly B. Trauner, ("CERF") defendants and counterclaimants in this antitrust action. The district court granted summary judgment on the CERF counterclaim, which challenged the Rickards group's original action as a violation of the antitrust laws. We affirm.

I. BACKGROUND

The dispute between these parties is before us for the second time. In *Rickard v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1499 (9th Cir.), *cert. denied*, 464 U.S. 994, 104 S.Ct. 488, 78 L.Ed.2d 683 (1983) (*"Rickards I"*), the district court granted CERF's motion for summary judgment, and entered a directed verdict denying the Rickards group recovery in their antitrust action, and we affirmed. The district court stayed the CERF counterclaim pending the disposition of this first appeal.

The underlying facts of this dispute were discussed in *Rickards I* and need not be discussed at length here. *See id.* at 1451-52. CERF was established as a non-profit organization to collect and disseminate information concerning hereditary eye disease in dogs. It operated a registry listing certain breeds of purebred dogs. Only dogs examined by veterinarians certified by the American College of Veterinary Ophthalmologists ("AVCO") were permitted to be listed in the registry. The Rickards

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* Honorable David W. Williams, Senior U.S. District Judge, for the United States District Court for the Central District of California, sitting by designation.

group were non-AVCO certified veterinarians, and thus were not permitted to perform the examinations required for CERF registration. This dispute centers on the efforts of the Rickards group either to be allowed to perform such examinations, or to drive CERF from the veterinary ophthalmology market. We turn briefly to the CERF counterclaim.

The counterclaim alleged that the Rickards group had violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2 (1982)), filed a vexatious complaint for an improper purpose, wrongfully interfered with CERF's present and prospective business relationships and had violated the California Cartwright Act and Unfair Trade Practices Act (Cal. Bus. & Prof. Code §§ 16,600, *et seq.*, 16,720 *et seq.*, and 17,000 *et seq.* (West 1964)).

Both the Rickards group and CERF filed cross-motions for summary judgment, and after the motions were fully briefed and argued, the magistrate, sitting as trial judge by stipulation of the parties, granted CERF's motion for summary judgment.

On March 1, 1984, the magistrate signed an order for partial final judgment and held that the Rickards group had (1) violated section 1 of the Sherman Act under both the rule of reason and per se standards; (2) violated Section 2 of the Sherman Act by engaging in a conspiracy to monopolize and an attempt to monopolize trade or commerce; and (3) brought a lawsuit which was baseless and a sham, and in furtherance of their overall scheme to violate the antitrust laws. The court awarded CERF $416,893.99 in damages, and trebled that amount pursuant to 15 U.S.C. § 15 (1982).

After the retirement of the magistrate who originally heard the case, it was assigned to another magistrate. The Rickards group's motion to alter or amend the March 1, 1984 judgment was denied on May 30, 1984

after further briefing and a hearing, and this timely appeal followed.

II. DISCUSSION

We review the grant of summary judgment de novo, and apply the same test as did the district court. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). Thus, "[a]ll 'evidence and factual inferences' must be viewed in the light most favorable to the adverse party and the summary judgment may be upheld only if 'there are no genuine issues of material fact and [the movant is] entitled to judgment as a matter of law.'" *Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985) (quoting *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983)).

We note that while antitrust conspiracies do not ordinarily lend themselves to summary disposition, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir.), *cert. denied*, 464 U.S. 849, 104 S.Ct. 156, 78 L.Ed.2d 144 (1983), summary judgment is sometimes appropriate in antitrust cases. *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 371-72 (9th Cir. 1985); *ALW, Inc. v. United Air Lines, Inc.*, 510 F.2d 52, 55 (9th Cir. 1975). Furthermore, a judgment may be sustained on any ground supported by the record. *Fruehauf Corp. v. Royal Exchange Assurance of America*, 704 F.2d 1168, 1171 (9th Cir. 1985).

The principal issue on appeal is whether the record supports summary judgment. The Rickards group contends that numerous fact questions required resolution by trial. They have failed, however, to identify, either in their briefs or at oral argument, any disputed material

question of fact which was not answered by uncontradicted affidavits or other documentary evidence in the record.

A. Section 1 Violation

To establish a section 1 violation by the Rickard group, CERF had to prove three elements: (1) an agreement or conspiracy, (2) resulting in an unreasonable restraint of trade, and (3) causing "antitrust injury." *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). The record is replete with corespondence proving an agreement on the part of the Rickards group to drive CERF out of business. While the mere expression of anticompetitive intent is insufficient to establish a section 1 claim, the record establishes acts committed in furtherance of the conspiracy. The Rickard group's vexatious litigation clearly affected CERF's business or property in a negative way; and the injury was of the type cognizable under the antitrust laws.

1. *The Concerted Refusal to Deal.*

The record indicates that after the Rickards group had failed in its efforts to convince CERF to allow veterinarians lacking ACVO-certification to participation in the CERF program, they encouraged ACVO members to stop dealing with CERF. There is evidence that this boycott of CERF met with some success. The minutes of the July 18, 1978 Executive Board meeting of the American Society of Veterinary Ophthalmology ("ASVO"), the professional organization established by the Rickards group, state that "[t]he ACVO members present did indicate that they had cut all ties with CERF." The district court concluded that the Rickards group's concerted refusal to deal with CERF violated section 1 under both a per se and a rule of reason analysis. We hold that a per se analysis is inappropriate under these facts.

The per se rule governs only if the practice at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 2960, 82 L.Ed.2d 70 (1984) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979)). Some practices, such as horizontal price-fixing, are clearly subject to per se analysis. *E.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). While there is some older case law suggesting that group boycotts are per se violations of section 1, *see, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13, 79 S.Ct. 705, 709-10, 3 L.Ed.2d 741 (1959); *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1211 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 105 S.Ct. 1874, 85 L.Ed.2d 166 (1985), the Supreme Court's most recent pronouncement on concerted refusals to deal requires that we look to the type of boycott at issue to determine if per se condemnation is required. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, —— U.S. ——, 105 S.Ct. 2613, 2619, 86 L.Ed.2d 202 (1985). Unless the challenged activity "falls into a category likely to have predominantly anticompetitive effects," the per se analysis of a concerted refusal to deal claim is overbroad. *Id.*, 105 S.Ct. at 2621. Anticompetitive effect is unlikely unless the boycotting party "possesses market power or exclusive access to an element essential to competition." *Id.* Nothing in the record suggests that the Rickards group possessed dominance in the veterinary ophthalmology market, or that it controlled an element essential to competition. On the contrary, it was CERF's growing position in veterinary ophthalmology that triggered the Rickards group's concerted action against it. Therefore, under *Northwest Wholesale Stationers*, the district

court's application of a per se analysis to the Rickards group's boycott was premature.

The district court found in the alternative that the Rickards group's concerted action violated section 1 under the rule of reason. Under this analysis, the moving party must establish that the action unreasonably restrained competition. *See Jefferson Parish Hospital District v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 1567, 80 L.Ed.2d 2 (1984). CERF attempted to meet its burden by showing that it temporarily suspended its registration activities during the pendency of the Rickards group's antitrust suit against it. CERF subsequently re-entered the market. Nothing in the record indicates that the boycott was the cause of the suspension of is registration business. In fact, the record suggests that the lawsuit was the only cause. Further, CERF may have lost profits from the temporary disruption of its business but failed to assert the claim. Therefore, we cannot affirm the district court's finding that the Rickards group's urging of ACVO members not to deal with CERF of itself violated section 1.

Although we reject the district court's finding of section 1 liability for the concerted refusal to deal orchestrated by the Rickards group, the court nonetheless made a valid finding of section 1 liability. The district court awarded CERF $416,893.99 in damages on its counterclaim.[1] This figure represents the amount spent by CERF in its defense against the antitrust suit filed against it by the Rickards group. Because a single lawsuit, when brought for anticompetitive purposes, may under certain circumstances constitute a violation of section 1, we affirm the district court's finding of liability on that basis. *See e.g., Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984) (single suit may

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[1] The figure was then trebled under 15 U.S.C. § 15 (1982) and attorney's fees for the prosecution of the counterclaim were added.

constitute antitrust violation when coupled with anticompetitive conduct external to the suit).

2. *The Noerr-Pennington Doctrine.*

Under the *Noerr-Pennington* doctrine, the petitioning of government is immune from antitrust liability. *See Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Although the doctrine as initially developed protected the petitioning of the legislative and executive branches, it was later extended to immunize from antitrust liability those who seek redress in the courts. *See California Transport v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1971). The *Noerr-Pennington* immunity is not, however, absolute. Immunity is not afforded to those who resort to sham or unfounded litigation solely for anticompetitive purposes. *Omni Resource Development Corp. v. Conoco Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir.1984). The Supreme Court has applied the sham exception when a meritless lawsuit is one of a pattern of baseless and repeated claims. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380, 93 S.Ct. 1022, 1031, 35 L.Ed.2d 359 (1973). This circuit has held that a single meritless suit may also be sufficient to forfend the *Noerr-Pennington* immunity. *Omni Resource*, 739 F.2d at 1414; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1257 (9th Cir.1982), *cert. denied*, 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 768 (1983). Our cases require, however, that the sham lawsuit be accompanied by additional evidence of anticompetitive activity before immunity will be called off. We stated in *Omni*:

> When the antitrust plaintiff challenges one suit and not a pattern, a finding of sham requires not only

> that the suit is baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anti-competitive. . . . 739 F.2d at 1414.

In this case we have a baseless lawsuit coupled with the evidence of a concerted refusal to deal which the trial court found sufficient, alone, to support liability. Although there is no evidence that the attempted boycott itself caused any cognizable antitrust injury, it provides sufficient corroboration of the Rickards group's anticompetitive motivation to warrant the application of the sham exception to *Noerr-Pennington.*

The application of the sham exception to single lawsuits may have a chilling effect on those who in good faith seek redress in the court. The threat of treble damages may discourage the filing of meritorious claims, or preclude plaintiffs from asserting novel or cutting-edge theories of liability. Thus, we must apply the sham exception with caution. The uncontradicted record in this case, however, shows that the Rickards group filed their action against CERF not because of a good faith belief that CERF had violated the antitrust laws, but as part of a concerted plan to force CERF out of the veterinary ophthalmology market. This kind of litigation deserves all the chilling effect the law allows. Further, the filing of suit was not the only overt act committed in furtherance of the conspiracy. The Rickards group sought to deprive CERF of the services of ACVO-certified veterinary ophthalmologists for its registration program. While the boycott, standing alone, did not support section 1 liability, its evidentiary value in explaining the lawsuit could not be ignored. The trial judge's finding of sham litigation on the paper record before him was the kind of inference drawing protected by Rule 52(a). *Anderson v. City of Bessemer City,* —— U.S. ——, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985).

3. *Antitrust Injury.*

CERF's sole damage claim is that of the costs incurred in defense against the baseless suit filed against it. Despite the application of the sham exception to *Noerr-Pennington*, CERF is not entitled to recover merely because its litigation costs were incurred as a result of the Rickards group's violation of section 1 of the Sherman Act. In order to recover, CERF must prove that the injury was "of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697-98, 50 L.Ed.2d 701 (1977). We have held that the costs incurred in the defense of a suit filed in violation of the antitrust laws constitute antitrust injury as defined in *Brunswick. Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir.1979) (*"Handgards I"*), *cert. denied*, 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980). After our decision in *Hangards I*, the Supreme Court construed *Brunswick* to require that the injury alleged in an antitrust suit be "of the type that the antitrust statue was intended to forestall." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540, 103 S.Ct. 897, 909 74 L.Ed.2d 723 (1983). Because CERF has an adequate state law tort remedy for the Rickards group's abuse of process, we question whether the injury at issue is of the type that Congress sought to redress in enacting the Sherman Act. This Court has specifically held, however, that the principles of antitrust standing set forth in *Associated General Contractors* did not affect our holding in *Handgards I* that the costs of litigating a frivolous suit are cognizable under the antitrust laws. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir.1984) (*"Handgards II"*), *cert. denied*, —— U.S. ——, 105 S.Ct. 963 83 L.Ed. 2d 968 (1985).

We hold that because the *Noerr-Pennington* immunity does not apply and because CERF claims damages that are treated as antitrust injury in this circuit, summary

judgment for counterclaimants on their section 1 claim was proper

B. Section 2 Violation

To establish a section 2 attempt to monopolize violation, CERF had to prove four elements: "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Rickards I*, 704 F.2d at 1455.

The record contains proof of specific predatory intent and anticompetitive conduct. The evidence shows that the Rickards group intended to keep lay persons from running a registry and that they employed threats of litigation to give effect to this intent. The Rickards group now contends that even if they made the purported threats, these threats do not support section 2 liability because there is no proof that the Rickards had or approached monopoly power. We agree.

The "dangerous probability of success" element may under some circumstances be inferred from direct evidence of specific intent coupled with anticompetitive conduct. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1029 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). When, however, there is no proof of market dominance, the conduct supporting an inference of specific intent to monopolize must be "of a kind clearly threatening to competition or clearly exclusionary." *Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1059 (9th Cir.1982), *cert. denied*, —— U.S. ——, 105 S.Ct. 2664, 86 L.Ed.2d 280 (1985). CERF has made no such showing. It has shown only that the Rickards group through its filing of a sham lawsuit inflicted costs upon it that are recoverable under *Handgards I*. It has demonstrated no serious threat to competition in the

veterinary ophthalmology market. CERF's own re-entry into that market after the grant of summary judgment in its favor in *Rickards I* cuts against any such finding.

In *Forro Precision*, this court found "implausible" the inference of specific intent to monopolize the worldwide market for electronic data processing products and services from the discrete harm inflicted by IBM against one vender of IBM-compatible equipment. 673 F.2d at 1061-62. CERF asks us to draw an equally implausible inference. It defines the relevant product market as "veterinary services in general." The claim that the Rickards group, through an attempted boycott of CERF and the filing of a single lawsuit, was attempting to monopolize the nationwide market for all veterinary services is, at best, implausible. Therefore, we hold that the summary judgment in favor of CERF on its section 2 claim was unsupported by the record. Because the damages awarded resulted from the section 1 violation, the magistrate's damage award need not be adjusted despite the lack of section 2 liability.

C. The Damages

Appellants challenge the calculation of damages, asserting that CERF has (1) claimed costs as well as attorney's fees as compensable damages, and (2) failed to allocate and remove from its damage claim the attorney's fees charged in prosecution of the counterclaim.

We may reverse the district court's finding of damages only if it was "clearly erroneous," Fed.R.Civ.P. 52(a), and we must be convinced that a "mistake has been committed." *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1299 (9th Cir.1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)), *cert. denied*, 104 S.Ct. 279 (1983). No error was committed here.

The cost of defending itself in the first lawsuit through its several appeals is an injury that CERF would not

have suffered but for the Rickards group's suit against it. The prevailing party need only provide some basis for a reasonable estimate of damages, *D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir.1982), and CERF has supported its antitrust damage claim for the wrongful infliction of the costs of this litigation. The district court's damage award was not clearly erroneous.

D. Validity of the Judgment

Finally, appellants assert that the magistrate did not sign the original judgment until March 2, 1984, one day after he had retired, and the judgment is thus void. This contention is not supported by the record. The judgment which appellants challenge is dated March 1, 1984. In addition CERF explains that appellants' confusion arose due to the fact that the letter with the judgment was misdated because of leap year. We presume that judgments by a court of competent jurisdiction are regular and correct. *Kalb v. Feuerstein*, 308 U.S. 433, 438, 60 S.Ct. 343, 345-46, 84 L.Ed. 370 (1940). The presumption is not rebutted in this case. The judgment is valid.

AFFIRMED.

MERRILL, Circuit Judge:

I dissent.

I cannot agree that as a matter of law the suit brought by the Rickards group was sham and that for that reason, as a matter of law, the *Noerr-Pennington* doctrine does not provide immunity from antitrust liability.

The district court made no factual findings on the issue; it simply held that the lawsuit was "baseless and a sham." As backing for the conclusion that it was, the majority opinion cites only the concerted refusal to deal which showed the group's "anticompetitive motivation."

But the desire to harm a competitor does not make a lawsuit a sham. Many antitrust suits have the goal of discomfiting competitors.

Rather, the relevant inquiry is whether the Rickards group intended to prevail and had some reasonable expectation that it might prevail. This is true even if the group intended to "destroy" CERF. "Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir.1982), *cert. denied*, 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983). The issue is whether the underlying action was commenced "without regard to merit or possible success . . . [and] without any intent to induce favorable action" by the government. *Id.*

Here, the Rickards group knew that CERF's own law firm had warned CERF about possible antitrust problems. The Federal Trade Commission had expressed interest in looking at CERF's exclusionary policies. The group members themselves testified at trial that they had believed CERF's practices to be illegal. A repetitive series of losing lawsuits would present a different case. Here we are faced with a single lawsuit. Further, it was one that the Rickards group saw fit to present to this court on appeal and after losing here to the Supreme Court on petition for certiorari. The case before this court required a substantial published opinion of 6 pages with 18 headnotes. *Rickards v. Canine Eye Registration Foundation. Inc.*, 704 F.2d 1449 (9th Cir.), *cert. denied*, 464 U.S. 994, 104 S.Ct. 488, 78 L.Ed.2d 683 (1983). This does not look sham to me.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2185

CV 79-3053 SAW (FSL)

D.A. RICKARDS; M.A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN,
Plaintiffs-Counterdefendants-Appellants,

v.

CANINE EYE REGISTRATION FOUNDATION INC., LAWRENCE M. TRAUNER, et al.,
Defendants-Counterclaimants-Appellees.

[Filed Apr. 29, 1986]

ORDER

BEFORE: MERRILL and GOODWIN, Circuit Judges and WILLIAMS, District Judge **

Judges Goodwin and William have voted to deny both appellant Sleasman's petition for rehearing and appellants Rickards, Custer and Belkins' petition for rehearing. Judge Merrill has voted to grant the petitions for rehearing.

Appellants' petitions for rehearing are denied.

** Honorable David W. Williams, Senior U.S. District Judge, for the United States District Court for the Central District of California, sitting by designation.